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No. 98-

IN THE

Supreme Court of the United States

OCTOBER TERM 1998

CITY OF SANTA BARBARA,

Petitioner,

v.

VICKIE L. EDWARDS, KATHLEEN ROSE MCCAULLEY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an ordinance that prohibits impeding or hampering another's access to medical facilities and places of worship by requiring a person to step back eight feet upon a specific request within a limited access area, is a constitutional time, place, and manner regulation.

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PETITION FOR WRIT OF CERTIORARI

Petitioner City of Santa Barbara respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on August 11, 1998.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 150 F.3d 1213 (9th Cir. 1998). App. A, *infra.*

JURISDICTION

The Ninth Circuit opinion was entered on August 11, 1998. A timely petition for rehearing was denied on October 6, 1998. App. B, *infra.*

This Court has jurisdiction under subdivision (1) of section 1254 of title 28 of the United States Code.

STATUTES INVOLVED

The First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right to the people peaceably to assemble, and to petition the government for a redress of grievances.

Subsection (A) of section 9.99.010 (Definitions) of the Santa Barbara Municipal Code provides in pertinent part:

> As used in this Chapter, the following terms and phrases shall have the indicated meaning:
>
> A. Access Area. Any portion of a public street or other public place or any place open to the public within one hundred (100) feet of the premises of a health care facility or place of worship.
>
> ....

Section 9.99.020 (Impeding Access Prohibited) of the Santa Barbara Municipal Code provides:

A. DEMONSTRATION ACTIVITY – OBLIGATION TO WITHDRAW. No person, in the course of demonstration activity within the access area of a health care facility or place of worship, acting alone or in concert with others, shall impede or hamper the free access to or departure from any health care facility or place of worship by failing to withdraw immediately to a distance of at least eight (8) feet away from any person who has requested such withdrawal. "Impede" or "Hamper" means to obstruct, hinder or delay.

B. WITHDRAWAL. For purposes of this Section, withdrawal may be requested by a person verbally, or by carrying or wearing a visible sign clearly indicating such withdrawal request. Statements by a person, or signs carried or worn by a person displaying words or symbols such as or similar in effect to "stop," "stop it," "withdraw," "back off," "get away," or "leave me alone" shall be sufficient to constitute a request to withdraw under this Section. Failure to comply immediately with any such request shall constitute a violation of this Section. Mere statements of opinion or disagreement made in the absence of a request to withdraw shall not be construed to be a request to withdraw under this Section.

C. DISTANCE. Distance under this Section shall be measured from that part of the closest demonstrator's body that is nearest to the closest part of the requesting person's body. For purposes of the preceding sentence, the term "body" shall

> include any natural or artificial extension thereof, including, but not limited to, an outstretched arm or a handheld sign.

Santa Barbara City Ordinance 4812 (1993).

STATEMENT OF THE CASE

After years of persistent and escalating obstructive demonstration activities, in May 1993 the Santa Barbara City Council unanimously enacted an ordinance to promote unfettered access to people exercising their constitutional rights to seek medical care and to worship at the place of their choice.

Ordinance 4812, codified as Chapter 9.99 of the Santa Barbara Municipal Code, prohibits impeding access to health care facilities and places of worship. Section 9.99.020, the subject of this Petition, requires a demonstrator who is impeding access of another within one hundred feet of a medical or religious facility to back off eight feet if a person specifically requests the space. Disagreements or arguments do not require withdrawal. The demonstrator is not silenced by a request and continues to demonstrate through and from the eight feet. The person asking for the space may talk to or listen or reach out for a leaflet from a demonstrator who backs away. App. D, *infra*. The eight feet of separation allows speech from an acceptable conversational distance.

Other tools may exist to dampen the volatility and harm of intimidation and obstruction tactics; however, Santa Barbara selected two narrowly tailored and effective measures to respond to these problems. During the two years it was enforced before it was enjoined, the ordinance buffered confrontations between competing fundamental interests while speech continued to be seen and heard

through the eight foot zone of separation.[1] For two years this local legislation reduced face-to-face intimidation and abuse because it distanced by eight feet shouting, screaming, or obstructing demonstrators.[2]

Respondents brought suit under section 1983 of Title 42 of the United States Code challenging the constitutionality of the eight foot back away provision, as well as the provision

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[1] Photographs confirm common experience that speech continues when one is eight feet from a targeted listener. Clerk's Record 16 at 78-86 (hereafter "CR"). Respondent Edwards's and others' declarations (CR 79; CR 16 at 37-48) and police reports, citations, photographs, and videotapes show that lively demonstrations continued during the time the ordinance was enforced and that the ordinance abated obstruction and intimidation tactics. CR 16 at 87-88, 91-102; CR 47 at 1-5, 12-14, 16, 19-22, 27-29, 34, 36, 39, 41, 47-49, 51, 55, 57, 61, 66, 71-73, 75, 80, 83, 88, 92, 98-100, 106, 109-10, 114, 117, 124, 126-29, 136, 140, 145-46, 148, 159-60, 163-64, 174-76, 184, 185, 187, 190, 194, 200-01, 204, 205, 207, 208, 214, 215, 218, 223, 229, 232, 237-38, 247, 249, 253, 255-56, 258, 264, 267, 275, 277, 281, 283, 288, 290-91, 293-95, 298, 300, 305, 307, 309, 311, 315, 322-23, 325, 329-30, 333, 335, 345, 347-48, 353, 368, 370, 378, 379, 381, 385, 387, 389-90, 397, 399, 405, 411-12; CR 48 at 425, 427, 430, 459, 462, 468, 470-71, 474, 476-78, 480-81, 483-85, 488, 491-93, 495-99, 502, 504-07, 515-18, 520-23, 525-27, 541, 544, 545, 548, 555-56, 558, 573, 577-80, 583, 585, 588, 590-91, 598, 600-02, 607, 609, 619-24, 626-27, 629-30, 636, 638, 643-44, 671, 676-79, 682, 685, 688, 694-96, 698-700, 704, 706-08, 710, 713-16, 720-21, 729, 736-38, 743-45, 773, 777-78, 811, 813-16, 819-21, 824, 826-27; CR 77 at 6, 8, 10, 12, 14, 16, 24, 26, 27, 30, 32, 33, 36, 38-40, 42, 43, 48 53, 55-57.

[2] Respondents were never prosecuted under the ordinance, and regularly demonstrated. CR 79; CR 8; CR 9; CR 55; CR 56; CR 67. Enforcement resulted in 111 citations. *See* footnote 1, *supra*. Criminal convictions withstood constitutional challenge under *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994). *Czekaj v. California*, slip op. (Sup. Ct. Santa Barbara Co., App. Dep't), *appeal denied*, 2d Crim. No. B090057, slip op. (Cal.App. 2d Dist.), *cert. denied*, 516 U.S. 808, 116 S.Ct. 53 (mem.) (1995).

that created an eight foot buffer zone around driveways to the facilities. The district court denied their request for a preliminary injunction and held that the eight foot driveway buffer and back away provisions were content neutral and narrowly tailored restrictions that furthered substantial government interests and provided ample speech alternatives. CR 22.

However, after this Court decided *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994), Respondents renewed their motion and the district court then enjoined the driveway buffer and the back away provision. *Edwards v. City of Santa Barbara*, 883 F.Supp. 1379 (C.D. Cal. 1995) (*Edwards I*). The City appealed.

In November 1995 the United States Court of Appeals for the Ninth Circuit vacated the preliminary injunction and remanded for reconsideration in light of *Sabelko v. City of Phoenix*, 68 F.3d 1169 (9th Cir. 1995) (*Sabelko I*). *Sabelko I* upheld a Phoenix, Arizona ordinance with an eight foot back away provision at medical facilities; therefore, on remand the district court now approved the eight foot back away provision at medical facilities. However, the district court continued to enjoin the back away provision at places of worship and the eight foot driveway buffer at both locations. CR 164. So, the City appealed again.

In February 1997 this Court vacated *Sabelko I* and remanded for reconsideration in light of *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997). *Sabelko v. City of Phoenix*, ___ U.S. ___, 117 S.Ct. 1077 (1997)(mem.).

On remand, the Ninth Circuit enjoined the Phoenix ordinance, reversing *Sabelko I*. *Sabelko v. City of Phoenix*, 120 F.3d 161, 165 (9th Cir. 1997) (*Sabelko II*); App. C,

infra. As a result, Respondents renewed their motion for a preliminary injunction against the back away provision at clinics in the Santa Barbara ordinance. The district court enjoined its enforcement and again the City appealed.

In August 1998 the Ninth Circuit reversed in part, affirmed in part, and vacated the awards of attorney fees and costs. It found that the ordinance was content neutral and upheld the eight foot driveway buffer as a constitutional time, place, and manner regulation. However, simply citing *Sabelko II* without analysis, the court of appeals enjoined the moving eight foot back away provision. *Edwards v. City of Santa Barbara*, 150 F.3d 1213, 1215-17 (9th Cir. 1998) (*Edwards III*); *see* App. A, *infra*.

In both *Sabelko II* and *Edwards III* the court of appeals made an erroneous and rote equation of the back away provisions in the Phoenix and Santa Barbara ordinances with the substantially different moving fifteen foot injunction provision that this Court invalidated in *Schenck*. The court of appeals did not adequately consider or apply the different First Amendment tests to evaluate an ordinance and an injunction. Nor did the court of appeals analyze how the "back away upon request" provision in the Santa Barbara ordinance is similar to the "cease and desist" requirement that this Court *upheld* in *Schenck*. *Schenck*, *supra*, at ___, 117 S.Ct. 870.

This Petition seeks review only of the portion of the Ninth Circuit decision enjoining enforcement of the eight foot back away provision.

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit has Unduly Restricted Local Government Response to Ongoing Problems of Obstruction and Harassment

Santa Barbara, Phoenix, and the city *amici* supporting this petition need effective tools to promote order and safety when demonstrators overstep the bounds of legitimate protest and try instead to thwart others from exercising their competing constitutional interests by blocking their access, getting in their way, stalking them, and trying to intimidate them by screaming at close range and refusing to stop. As this Court has recognized, this behavior presents risks of duress and coercion that may appropriately be regulated. *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 684 (1992). Throughout this nation, demonstrators have resorted to "in-your-face" tactics of harassment, obstruction, and interference with people trying to use health care clinics and places of worship. This is a persistent problem confronting American cities, which find traffic safety endangered, harassment complaints escalating, fist-fights erupting on their streets, and citizens clamoring to city councils and police for a solution to defuse the danger and tension. The record below, chronicling the problems that plagued Santa Barbara, reports a common experience on sidewalks and streets. When, as the record here shows, demonstrators persist in nose-to-nose harangues or wave large signs in front of others' faces or vehicles, the targeted people cannot pass freely or safely and often become intimidated or terrorized or strike out to stop the unwanted harassment.

During early 1993 the Santa Barbara City Council was pressed to respond to volatile and escalating local activities at health care facilities and places of worship. The national anti-

abortion direct action group Operation Rescue had begun a national and state campaign, "No Where to Hide," which targeted congregations and religious facilities attended by physicians who performed abortions. Operation Rescue and its local adherents had staged intimidating activities at the church of a Santa Barbara physician.[3] The demonstrators interfered with congregates' access to the church, blocked their path, screamed at them, and refused to back away. The demonstrators also threatened the congregation that their harassing and intimidating disruptions would continue unless they expelled the physician from the congregation. Meanwhile, intimidating activity escalated at the clinic where the doctor performed surgery. The clinic's location in the midst of downtown on a busy street that is the primary access route to a freeway raised traffic safety concerns.[4] Driveway congestion, which then backed up street traffic, and driver stress occurred daily because demonstrators formed gauntlets with their bodies and large signs, yelled at drivers, threw unwanted materials in windows, and approached and obstructed cars waiting in the street to enter the driveway. These very close encounters caused disputes, fights, anger, stress, and fear.[5] Years earlier,

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[3] *See, e.g.*, CR 16 at 44: 25-28, 45, 46: 1-15; 72-76, 47: 9-28, 90-93, 99-102, 111-13, 118-19; CR 49 at 895-96, 964, 984, 1022, 1026, 1032-41, 1049-51, 1095-96, 1118, 1198: 11-26, 1199: 1-20, 1199: 23-26, 1200-01, 1206: 3-26, 1207: 1-13, 1210: 22-16, 1211: 1-23, 1212: 14-26, 1214: 21-26, 1215: 1-14, 1216: 16-22, 1219: 13-26, 1220: 1-10, 1221: 13-26, 1222: 1-5, 1223: 4-20, 1224: 21-26, 1225: 1-6, 1226: 15-26, 1231: 6-19, 1232: 6-20, 1233: 16-26, 1234: 1-13, 1236: 23-26, 1237: 1-12, 1238: 17-26, 1239: 1-7, 15-26, 1240: 1-2, 6-26, 1241: 1-19, 22-24, 1242: 1-12.

[4] CR 16 at 37: 26-28, 38: 1-20, 41, 47: 21-28.

[5] *See, e.g.*, CR 16 at 45: 16-28, 46: 1-15, 47: 9-28, 72-74, 75, 76, 92, 93, 100-102; CR 49 at 896, 1022, 1050, 1051, 1096, 1199, 1210-11, 1224-25, 1233-34, 1236-37, 1242.

the clinic had obtained federal and state injunctions prohibiting blocking and trespassing in an attempt to regulate its access problems. *Planned Parenthood v. Aakhus*, 14 Cal. App.4th 162, 167, 169, 17 Cal.Rptr.2d 510, 512-13, *rev. denied* (Cal. Sup. Ct. 1993). However, the injunctions proved ineffective. Thus, despite the injunctions, obstruction and interference with access continued, and even increased.

The dangerous effects of the intimidation tactics were decried in several public meetings. Citizens called on the City Council to enact an ordinance that would apply to everyone and could be even-handedly enforced by police. Constituents and clergy testified to persistent demonstration activities that were confrontational, intimidating, stressful, and caused traffic hazards. CR 16 at 90-93, 99-102, 111-13, 118-19; CR 49 at 1196-1242, 1251-57. The City Council concluded that these volatile demonstration tactics were a threat to public order and safety and undermined the City's interest in assuring that one person's exercise of constitutional rights does not overwhelm or deprive another's exercise of equally important constitutional rights. In addition to the information gleaned at the hearings, the Council read articles about the adverse psychological, physiological, and medical effects of stress and intimidation, and about cultural needs for a safe zone of personal space in public encounters. The Council then studied legislation of other cities, rejected particular measures enacted by some cities as not sufficiently tailored to the Santa Barbara problems and to the governmental interests at stake, and crafted its own access provisions now codified as Chapter 9.99 of the Municipal Code. CR 16 at 90-119; CR 49.

No differently than Santa Barbara, other local governments need flexibility to respond to persistent campaigns of harassment. However, each community

experiences differently the problems caused by obstructive and intimidating demonstration activities, which themselves vary. As a result, not all communities may find the same tools effective to handle their unique traffic conflicts, location, geographic, physical layout, and dimensions of targeted facilities, or types of demonstration activities. Many disrupted communities, like Santa Barbara, find that anti-trespassing provisions or demonstration-free buffer zones around targeted facilities insufficiently protect the governmental interests in traffic and public safety. This is so because people seeking access to health care facilities or religious institutions are in motion, whether arriving by car, bus, or bicycle or on foot. Within discrete geographical areas around these buildings, people need to be able to move without physical obstruction and mental or verbal abuse Therefore, many cities need a regulatory device that accommodates both the inevitable mobility of people seeking unfettered access and the right of demonstrators to be seen and heard by these people and other passersby. The "back away upon request" provision adopted by Santa Barbara is precisely the sort of narrow but flexible provision that properly accommodates these interests.

In *Schenck*, this Court specifically left open the possibility that government may use a zone of separation measured by a set distance between individuals trying to enter health care clinics and protestors wishing to impede them. *Schenck*, *supra*, at ____, 117 S.Ct. 867. The Ninth Circuit plainly erred when it interpreted *Schenck* to categorically ban any sort of provision establishing a moving zone of separation between protestors and individuals they target for obstruction and harassment. See *Edwards III*, *supra*, 150 F.3d 1215, 1217 (App. A, *infra); Sabelko II*, *supra*, 120 F.3d 165 (*See* App. C, *infra.)* With its sweeping decision flatly prohibiting any form of zone of separation,

even the common-sense anti-harassment "back away upon request" provision adopted by Santa Barbara, the Ninth Circuit has drastically curtailed the flexibility that municipal governments urgently need to craft tailored yet effective responses to volatile, obstructive, and intimidating tactics.

The court of appeals deemed the "back away upon request" ordinance unconstitutional because "other means might exist" to deal with the problems without burdening as much speech. *Ibid.* This determination fails to recognize that little, if any, speech is curtailed by merely requiring an obstructive protestor to back eight feet away from the person he or she is impeding. Moreover, it ignores the venerable standard for reviewing municipal ordinances affecting speech, a standard crafted by this Court with due deference to the local need for flexible regulations carefully tailored to protect significant government interests. As this Court counseled in *Ward v. Rock Against Racism*, 491 U.S. 781, 798-800 (1989), to constitute a reasonable time, place, and manner restriction, an ordinance that regulates speech "need not be the least restrictive or least intrusive means. . . . So long as the means chosen are not substantially broader than necessary to achieve the government's interest, however, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative."

This Court should grant this Petition to restore to municipal governments the regulatory flexibility to resort to narrow back away requirements to defuse the potential for violence, intimidation, and obstruction presented by persistent "in your face" tactics. A significant feature of the most egregious behavior that Santa Barbara attempted to limit is the demonstrator's tactic of occupying a target's path of travel while shouting nose-to-nose. Common life

experience teaches that separating people eight feet by requiring the harasser to back away upon request may prevent or stop mental abuse and physical violence. The decision below merits review because it has barred a local government from using such a common sense, modest regulatory approach to an escalating social problem.

II. This Court Needs to Guide Cities by Defining a Constitutional Zone of Separation

In recent decisions, this Court has articulated the permissible constitutional scope of injunctions regulating speech, but this Court has not provided guidance to cities about what they may accomplish through ordinances when they can no longer ignore escalating obstructive demonstrations and constituents' demands for safe and reasonably unfettered access to health care institutions and places of worship. Several other cities have, like Santa Barbara, attempted to respond to this problem by creating *de minimus* zones of separation, which do not prohibit speech, between demonstrators and their targets. The decision below casts doubt on whether such a response is constitutionally permissible and seems to dictate to cities that they must stand aside helplessly while aggressive and obstructive protestors harass and interfere with citizens trying to exercise their right to reach a facility without intimidation, abuse, and obstruction. Thus, not only Santa Barbara but many other cities would benefit from guidance from this Court about the constitutional parameters governing ordinances tailored to respond to abusive tactics.

This guidance is all the more necessary now. As the Ninth Circuit's erroneous decisions illustrate, lower courts are misreading *Schenck* and *Madsen*, which scrutinized injunctions, and applying them without analysis to different

provisions in ordinances. The injunction precedents are insufficient to help local governments devise effective time, place, and manner regulations or to help courts review such measures. As local governments have faced ever varying protest tactics they have perceived the need to adopt regulatory provisions that differ from those reviewed in *Schenck* and *Madsen*; moreover, local governments must adopt such provisions knowing that this Court has not reviewed *any* ordinance that seeks to regulate the escalating social problem of obstructive protest activity.

The Ninth Circuit's decisions have generated confusion and uncertainty among municipal governments, which face significant liability if they resort to a modest back away regulation that has proven effective in volatile and dangerous situations. For example, even though Santa Barbara's back away provision is comparable to the "cease and desist" provision upheld in *Schenck*, the Ninth Circuit would not consider that analogous provision as a yardstick for the City ordinance. It holds *Schenck* to mean that all zones of separation are unconstitutional. It did not analyze the City's back away provision for its similarity to an injunctive measure that was approved in *Schenck*. Having reached its rote conclusion, the Ninth Circuit did not explore what "sort of zone of separation between individuals entering the clinics and the protestors, measured by the distance between the two," the First Amendment will allow in ordinances. *Schenck, supra,* 519 U.S. at ____, 117 S.Ct. 867. Consequently, cities are now uncertain whether they may adopt a type of ordinance that has proven very effective in curtailing abusive, obstructive, intimidating conduct while still permitting robust protest activity.

The Ninth Circuit failed to recognize that not all moving zone of separation provisions are the same or that an

ordinance's provisions should receive a more lenient scrutiny than an injunction's. The City's narrowly tailored eight foot "back away upon request" zone of separation is an example of a measure that should be allowed because it lacks the vagueness or compliance problems that caused this Court to invalidate the injunction in *Schenck*.

The *Schenck* fifteen foot provision was too broad, preventing leafleting and speech from a normal conversational distance and burdening more speech than was necessary to serve the governmental interests. *Id.*, at ___, 117 S.Ct. 866-68. However, the Santa Barbara provision allows leafleting to occur with or without a request to withdraw. If the request is made, the person who made the request may ask for a leaflet or reach out for one. The eight feet of separation does not require silence or that communication or interaction cease. This provision is less broad also because it only affects demonstrators within the one hundred foot access area and a demonstrator does not have to maintain a fifteen foot distance from all persons seeking access. A demonstrator only needs to keep a distance of eight feet from the specific person who requested it.

Importantly, the record here shows that the Santa Barbara ordinance is not burdened by the vagueness of *Schenck*'s moving fifteen foot provision. Here, the back away provision existed during contentious demonstration activity. Nothing in the record implies confusion about how it worked or that Respondents or anyone could not comply with it.[6] One of the citations issued during enforcement was for a violation of the eight foot back away provision. The police report shows that the provision was useful and a *de*

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[6] Moreover, such hypothetical problems are redressed by prosecutorial discretion or defenses raised in actual cases.

minimus speech restriction that reached only obstructive, interfering, and dangerous conduct. A demonstrator had gone into the street near a clinic and went up to a car occupied by a mother and daughter, which was lined up waiting to enter the driveway to the clinic. As a result of the demonstrator's speech and conduct at and in the passenger window, she was requested to back off. Her response was to leave, return with a sign, and continue shouting next to and into the car as she waved the sign in the windows. The driver become extremely upset and sped into and through the driveway. CR 47 at 126, 128-29.

III. This Back Away Provision is a Valid Legislative Choice

The back away upon request provision is a *de minimus* speech regulation that does not reach mere speech. Speech and conduct are unrestrained without a specific request to back away; until a request is made, face-to-face and nose-to-nose speech may occur. Subsection (B) of section 9.99.020 provides that "[m]ere statements of opinion or disagreement made in the absence of a request to withdraw shall not be construed to be a request to withdraw under this Section." *See* App. D, *infra*.

Furthermore, the specific request to withdraw affects only the demonstrator whose conduct "impedes" or "hampers" free access or egress, defined as "to obstruct, hinder or delay," within the limited one hundred foot access area of a facility. Santa Barbara Municipal Code § 9.99.020 (A); App. D, *infra*. Then, compliance requires an obstructive demonstrator to stay back eight feet from a targeted person, which is a normal public conversational distance. The required "distance" is "measured from that part of the closest demonstrator's body that is nearest to the closest part of the

requesting person's body." Only the closest requested person needs to withdraw. Santa Barbara Municipal Code, § 9.99.020 (C); *see* App. D, *infra*.

This Court *upheld* a similar provision in *Schenck* that allowed demonstrators to go up close to anyone and only required someone to back away to the edge of the fifteen foot buffer zone *if* so requested. *Schenck*, *supra*, at ___, 117 S.Ct. 870. Both the Santa Barbara and the *Schenck* provisions allow fully expressive activities immediately adjacent to the zone of separation. Talking, parading, counseling, singing, shouting, praying, displaying signs, or leafleting continue. Arguably, communication improves after it has been distanced eight feet in the demonstration setting. Regardless, both of these provisions are based on a reasonable assumption that distancing obstruction and intimidation tactics will moderate their damage to their targets and their myriad potential harmful effects on public streets and sidewalks. Thus, local governments need this Court's guidance to enact and enforce useful zones of separation to allow targeted persons unfettered movement in limited access areas.

CONCLUSION

The Court should grant this Petition to advise cities and courts of the constitutional scope of a legislated zone of separation to redress conflicts between competing and equal First Amendment rights.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT.

Nos. 95-56790, 96-56262 and 96-56558.

Vickie L. EDWARDS; Kathleen McCaulley,
Plaintiffs-Appellees,

v.

CITY OF SANTA BARBARA,
Defendant-Appellant.

Vickie L. EDWARDS; Kathleen McCaulley,
Plaintiffs-Appellees,

v.

CITY OF SANTA BARBARA,
Defendant-Appellant.

Vickie L. EDWARDS; Kathleen McCaulley,
Plaintiffs-Appellees,

v.

CITY OF SANTA BARBARA,
Defendant-Appellant.

Argued and Submitted Nov. 3, 1997.

Decided Aug. 11, 1998.

Sidewalk counselors challenged city ordinance limiting demonstration activity near health care facilities and places of worship. The United States District Court for the Central District of California, Richard A. Gadbois, Jr., J., 883 F.Supp. 1379, preliminarily enjoined ordinance's enforcement. City appealed. The Court of Appeals vacated and remanded. The District Court, Ronald S. W. Lew, J., en-

joined enforcement of three of four challenged provisions and awarded counselors fees and costs. City appealed. The Court of Appeals held that: (1) city's interests were sufficient, under First Amendment, to sustain ordinance; (2) ordinance provisions creating fixed buffer zone within eight feet of entrances to health care facilities and places of worship was narrowly tailored to serve city's interests and left open ample alternative means of communication; and (3) provisions creating floating buffer zone within 100 feet of facilities and places of worship were not narrowly tailored to serve city's interests.

Affirmed in part, reversed in part, and attorney fees and costs vacated.

Appeal from the United States District Court for the Central District of California; Richard A. Gadbois, Jr., District Judge, Presiding.
D.C. No. CV-94-02243-RG-JRx.

Appeals from the United States District Court for the Central District of California; Ronald S. W. Lew, District Judge, Presiding.
D.C. No. CV-94-02243-RSWL.

Before: BROWNING, BRUNETTI and FERNANDEZ, Circuit Judges.

PER CURIAM:

Vickie Edwards and Kathleen McCaulley, two "sidewalk counselors," challenged an ordinance of the City of Santa Barbara, California limiting demonstration activity near health care facilities and places of worship, passed after a protracted history of harassment by anti-abortion protestors. The ordinance prohibits demonstration within eight feet of entrances to medical facilities or places of worship, and permits a patient or worshiper to create an eight foot "floating buffer zone" or "bubble" within one hundred feet of

such entrances by asking the demonstrator to withdraw.[1] The district court preliminarily enjoined enforcement of the ordinance. We remanded for reconsideration in light of Sabelko v. City of Phoenix, 68 F.3d 1169 (9th Cir.1995). On remand, the district court enjoined three of the four challenged provisions, upholding only the floating buffer zone within one hundred feet of a health care facility. The plaintiffs successfully moved for supplemental fees and costs. The City appealed the grant of the injunction and the award of fees and costs.

In the interim, the Supreme Court vacated our decision in Sabelko and remanded in light of Schenck v. Pro-Choice Network of Western New York, 519 U.S. 357, 117 S.Ct. 855, 137 L.Ed.2d 1 (1997). On remand, we held the Phoenix floating buffer zone provision unconstitutional and enjoined its enforcement. See Sabelko v. City of Phoenix, 120 F.3d 161, 165 (9th Cir.1997).

Guided by Schenck and Sabelko, we affirm the district court's preliminary injunction enjoining enforcement of the floating buffer zone provision. However, we conclude the fixed driveway provisions are a reasonable time, place, and manner restriction, and vacate the preliminary injunction of their enforcement.

I.

Ordinance 4812 prohibits all demonstration activity within a specified distance of health care facilities and places of

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[1] See Section 9.99.030 ("the driveway provision" or "fixed buffer zone" prohibiting demonstration within eight feet of entrances to medical clinics or places of worship); see also Section 9.99.020 (the "bubble" or "floating buffer zone" permits people within one hundred feet of such entrances to request that anyone who approaches them "withdraw to a distance of . . . eight feet").

worship without regard to the message conveyed.[2] Because it is content neutral, the ordinance passes constitutional muster if it is "narrowly tailored to serve a significant government interest and . . . leave[s] open ample alternative channels of communication." Frisby v. Schultz, 487 U.S. 474, 482, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988) (internal quotations omitted).[3] Although the regulation "must be *1216 narrowly tailored to serve the government's legitimate, content-neutral interests[,] . . . it need not be the least restrictive or least intrusive means of doing so." Ward v. Rock Against Racism, 491 U.S. 781, 798-99, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989).[4]

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[2] It is undisputed that the ordinance prohibits speech in a traditional public forum. See, e.g., Frisby v. Schultz, 487 U.S. 474, 479-82, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988).

[3] Plaintiffs argue the ordinance was designed to suppress their viewpoint. See, e.g., Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993) (local ordinance struck down because of viewpoint bias reflected in the legislative history). However, an ordinance may be motivated by a concern about the effects of speech without running afoul of the First amendment. See City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47-49, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). The fact that a majority of those prosecuted under the ordinance have been anti-abortion protesters does not permit an automatic inference of discriminatory purpose in its adoption.

The plaintiffs also argue that the ordinance has been selectively enforced against them, citing the deposition responses of two police officers to hypothetical questions. This argument lacks force, given the small number of citations issued by these two officers and the fact that thirty-one other officers issued the remaining citations. Moreover, the training video clearly shows the Deputy City Attorney explaining that all demonstration activity is prohibited regardless of the "side."

[4] See also Madsen v. Women's Health Center, Inc., 512 U.S. 753, 764- 65, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994) (announcing a newly heightened standard for content-neutral injunctions, but restating the Ward test for legislative enactments of general applicability).

A single legitimate government interest may be sufficient to sustain a content-neutral regulation. See, e.g., Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 650 n. 13, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981) (declining to consider second and third interests advanced by the state to justify a time, place, and manner restriction because the first adequately supported the regulation). The City contends three valid interests are served by the ordinance: (1) protecting persons seeking medical services or engaging in worship from harassment or intimidation; (2) ensuring access to medical facilities and places of worship; and (3) ensuring traffic safety. The Supreme Court has held these interests sufficient. See Schenck, 117 S.Ct. at 866 (government interests in "ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks, protecting property rights, and protecting a woman's freedom to seek pregnancy-related services" are "certainly significant enough to justify an appropriately tailored injunction to secure unimpeded physical access to the clinics"). The City must also demonstrate that the ordinance is "narrowly tailored" to serve these valid interests and "leave[s] open ample alternative channels of communication." Ward, 491 U.S. at 791, 109 S.Ct. 2746.

II.

In district court, the plaintiffs-appellees successfully challenged the driveway provisions creating a fixed buffer zone within eight feet of the entrances to medical facilities and places of worship, as well as the floating buffer zone in connection with places of worship.[5]

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[5] The district court upheld the floating buffer zone within one hundred feet of a health care facility and the plaintiffs have not appealed that decision. On October 6, 1997, in light of our decision upon remand from the Supreme Court in Sabelko, the district court granted plaintiffs' renewed motion for preliminary injunction barring enforcement of the floating buffer zone as applied to health care facilities.

1. Driveway provisions.

Recent Supreme Court precedent has upheld much larger fixed buffer zones using the more rigorous standard for content-neutral injunctions. See Madsen, 512 U.S> at 770, 114 S.Ct. 2516; Schenck, 117 S.Ct. at 868. Against this background, the driveway provision does not sweep too broadly. A distance of eight feet is not too great to limit most forms of protest, and conversation is easily possible at that distance. The provision is narrowly tailored to the City's objectives: it ensures access to health care facilities by providing a clear, easily enforced zone of protection for the driveway entrances; facilitates the free flow of traffic by preventing protesters from blocking entrances; and furthers the City's interest in public safety and prevents direct "face to face" confrontations that could escalate into violence by physically separating demonstrators from persons entering the driveway areas. See Schenck, 117 S.Ct. at 866.

Although the driveway provision in connection with places of worship is unrelated *1217 to the City's interest in protecting patients in need of medical care, it is narrowly tailored to the City's interest in ensuring access to religious worship. It permits ample alternative avenues of communication, by placing no limit on speech or expressive activity outside a narrow zone.

2. Floating buffer zone.

With respect to the floating buffer zone, our decision in Sabelko, invalidating an eight-foot buffer zone on the grounds that it was not narrowly tailored, is dispositive. Like the provision challenged here, the invalidated buffer zone could be invoked within one hundred feet of a clinic. Unlike the ordinance challenged in Sabelko, Santa Barbara's ordinance has a severability clause. We, therefore, need not invalidate the entire ordinance. See Sabelko, 120 F.3d at 165.

III.

On appeal, the plaintiffs have prevailed on only one of their challenges to the ordinance. We therefore vacate the original award and the supplemental award of attorneys' fees and costs and remand for redetermination of the amount due.[6] The district court should arrive at a reasonable fee award by identifying the specific hours expended on the floating buffer zone provision or by reducing the overall award to reflect the plaintiffs' limited success. See Texas State Teachers Ass'n v. Garland Indep. School Dist., 489 U.S. 782, 791-92, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989).

Each party shall bear its own costs.

REVERSED IN PART; AFFIRMED IN PART; ATTORNEYS' FEES AND COSTS VACATED.

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[6] The district court clearly stated the applicable standard for evaluating Section 1988 awards in its October 24, 1995 order, granting the plaintiffs' motion for attorneys' fees. The supplemental award of fees and costs was also within the discretion of the district court. In each instance, the request for fees was supported by billing statements.

APPENDIX B

[stamp—FILED; OCT - 6 1998; CATHY A. CATTERSON, CLERK; U.S. COURT OF APPEALS]

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 95-56790
D.C. No. CV-94-02243-RG-JRx

VICKIE L. EDWARDS; KATHLEEN McCAULLEY,
Plaintiffs-Appellees,

v.

CITY OF SANTA BARBARA,
Defendant-Appellant.

NOW LEGAL DEFENSE AND EDUCATION FUND, etc.
Amici Curiae.

No. 95-56262
D.C. No. CV-94-02243-RSWL

VICKIE L. EDWARDS; KATHLEEN McCAULLEY,
Plaintiffs-Appellees,

v.

CITY OF SANTA BARBARA,
Defendant-Appellant.

NOW LEGAL DEFENSE AND EDUCATION FUND, CALIFORNIA MEDICAL ASSOCIATION; CITY AND COUNTY OF SAN FRANCISCO,
Amici Curiae.

No. 96-56558
D.C. No. CV-94-02243-RSWL

VICKIE L. EDWARDS; KATHLEEN McCAULLEY,
Plaintiffs-Appellees,

v.

CITY OF SANTA BARBARA,
Defendant-Appellant.

NOW LEGAL DEFENSE AND EDUCATION FUND, CALIFORNIA MEDICAL ASSOCIATION; CITY AND COUNTY OF SAN FRANCISCO,
Amici Curiae.

ORDER

Before: BROWNING, BRUNETTI and FERNANDEZ, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for an en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 359(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT.

No. 94-15495.

Katherine SABELKO and Nancy Barto,
Plaintiffs-Appellees,

v.

The CITY OF PHOENIX; Paul Johnson; Thelda Williams; Frances Emma Barwood; Skip Rimsza; Craig Tribken; John Nelson; Kathy Dubs; Salomon F. Leija; Calvin C. Goode,
Defendants-Appellants.

July 14, 1997.

As Amended Aug. 1, 1997.

Antiabortion "sidewalk counselors" brought action challenging, on First Amendment grounds, ordinance that imposed "floating buffer zone" restriction upon demonstrators outside of health care facilities. The United States District Court for the District of Arizona, Stephen M. McNamee, J., 846 F.Supp. 810, issued injunction against enforcement, and city appealed. After the Court of Appeals reversed, the United States Supreme Court vacated and remanded for further consideration. Upon remand, the Court of Appeals, Beezer, Circuit Judge, held that: (1) ordinance was content-neutral; (2) ordinance was not narrowly tailored, and thus violated First Amendment's free speech clause; and (3) Court of Appeals lacked authority to remedy ordinance.

Affirmed.

On Remand from the United States Supreme Court, D.C. No. CV-93-02229-SMM.

Before: SCHROEDER, BEEZER and THOMPSON, Circuit Judges.

ORDER

The opinion filed on October 19, 1995 is hereby withdrawn.

OPINION

BEEZER, Circuit Judge.

We reconsider whether a City of Phoenix ordinance which imposes a "floating buffer zone" restriction upon demonstrators outside of health care facilities violates the First Amendment. We affirm the district court's decision declaring the Phoenix ordinance unconstitutional and enjoining its enforcement.

I

In 1993, the City of Phoenix, Arizona enacted an ordinance limiting demonstration activity near health care facilities due to concern about harassment outside such facilities. The ordinance makes it unlawful "for any person, in the course of demonstration activity *163 within the access area of a health care facility, to fail to withdraw upon a clearly communicated request to do so to a distance of a least eight (8) feet away from any person who has made the request." [1]

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[1] Specifically, the ordinance provides:

ORDINANCE NO. G3705

AN ORDINANCE AMENDING CHAPTER 23, ARTICLE 1 OF THE PHOENIX CITY CODE, BY ADDING SECTION 23-10.1, RELATING TO UNIMPEDED ACCESS TO HEALTH CARE FACILITIES; AND DECLARING AN EMERGENCY.

[Footnote 1 continued on following page]

Plaintiffs-Appellees Katherine Sabelko and Nancy Barto refer to themselves as "sidewalk counselors" who engage in demonstration activity outside abortion clinics in Phoenix. The plaintiffs filed a 42 U.S.C. § 1983 action in district court seeking declaratory and injunctive relief against the City of Phoenix on the grounds that the ordinance as applied

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WHEREAS, unimpeded access to health care services is critically and uniquely important to the public health, safety and welfare; and

WHEREAS, persons attempting to access health care facilities are subject to harassing or intimidating activity tending to impede their access to those facilities by demonstrators approaching within extremely close proximity; and

WHEREAS, such activity near health care facilities creates a "captive audience" situation where persons seeking services cannot avoid the area outside the facilities, and their physical and emotional conditions may make them especially vulnerable to the adverse physiological and emotional effects of such harassing or intimidating activities directed at them from extremely close proximity; and WHEREAS, such activity in extremely close proximity tends to undermine a person's right to privacy and interference with a person's right to seek legitimate health care treatment and counseling; and

WHEREAS, this ordinance does not preclude all protesting, picketing, demonstrating, leafleting or educational activities near a health care facility but is a necessary time, place and manner restriction intended to reconcile and protect the First Amendment rights of demonstrators and the rights of persons using health care facilities to be free from direct confrontation, hindrance, harassment, intimidation and harm; and

WHEREAS, existing law does not adequately protect such access to health care facilities; NOW THEREFORE,

BE IT ORDAINED by the Council of the City of Phoenix as follows:

SECTION 1. Chapter 23, Article 1, Phoenix City Code, is amended by adding section 23-10.1 to read:

Sec. 23-10.1 IMPEDING ACCESS TO HEALTH CARE FACILITIES.

A. It is unlawful for any person, in the course of demonstration activity within the access area of a health care facility, to fail to withdraw upon a

[Footnore 1 continued on following page]

violated the free speech provisions of the First Amendment. In a published decision, the district court declared the ordinance unconstitutional and issued an injunction. See Sabelko v. City of Phoenix, 846 F.Supp. 810 (D. Ariz. 1994). We reversed the district court. Sabelko v. City of Phoenix, 68 F.3d 1169 (9th Cir.1995), vacated, ___ U.S. ___, 117 S.Ct. 1077, 137 L.Ed.2d 212 (1997); but see Sabelko, 68 F.3d at 1173 (Beezer, J. dissenting). The Supreme Court vacated our judgment and remanded "for further consideration in light of Schenck v. Pro-Choice Network of Western New

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clearly communicated request to do so to a distance of at least eight (8) feet away from any person who has made the request.

B. For purposes of this section:

1."Across area" means any portion of a public street or other public place or any place open to the public within one hundred (100) feet of an exterior wall or entryway of a health care facility.

2. "Demonstration activity" includes but is not limited to protesting, picketing, distributing literature, attempting to impede access, or engaging in oral protest, education or counseling activities.

3. "Health care facility" means any hospital, clinic, office, building or other place used to provide medical, psychological, nursing or other health care services, including family planning counseling and pregnancy-related services.

C. For purposes of this section, distance shall be measured from that part of the closest demonstrator's body that is nearest to the closest part of the requesting person's body. The term "body" includes any natural or artificial extension of a person's body including but not limited to an outstretched arm or a hand-held sign.

SECTION 2. WHEREAS, the immediate operation of the provisions of this ordinance is necessary for the preservation of the public peace, health and safety, an EMERGENCY is hereby declared to exist, and this ordinance shall be in full force and effect from and after its passage by the Council as required by the City Charter and is hereby exempted from the referendum clause of said Charter.

PASSED by the Council of the City of Phoenix this 17th day of November, 1993.

York, [___ U.S. ___, 117 S.Ct. 855, 137 L.Ed.2d 1 (1997)].'' Sabelko v. City of Phoenix, ___ U.S. ___, 117 S.Ct. 1077, 137 L.Ed.2d 212 (1997).

*164 II

We first determine whether Phoenix ordinance No. G3705 is content- neutral. We inquire whether ''the government has adopted a regulation of speech 'without reference to the content of the regulated speech.' '' Madsen v. Women's Health Center, Inc., 512 U.S. 753, 763, 114 S.Ct. 2516, 2523, 129 L.Ed.2d 593 (1994) (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791, 109 S.Ct. 2746, 2754, 105 L.Ed.2d 661 (1989)). In Madsen, the Supreme Court considered an injunction prohibiting demonstrators from ''congregating, picketing, patrolling, demonstrating or entering'' within 36 feet of a health care clinic. Id. at 759, 114 S.Ct. at 2522. The Court held that ''none of the restrictions imposed by the court were directed at the contents of petitioner's message.'' Id. at 763, 114 S.Ct. at 2523.

The Phoenix ordinance regulates all demonstration activity within 100 feet of a clinic. The term ''demonstration activity'' is defined as including, but is not limited to, ''protesting, picketing, distributing literature, attempting to impede access, or engaging in oral protest, education or counseling activities.'' Like the injunction in Madsen, the Phoenix ordinance does not refer to the content of the speech that it regulates. It is content-neutral.

III

We next determine whether the content-neutral, time, place and manner restrictions in the Phoenix ordinance are ''narrowly tailored to serve a significant government interest, and leave[s] open ample alternative channels of communication.'' Ward, 491 U.S. at 791, 109 S.Ct. at 2753; see Madsen, 512 U.S. at 764, 114 S.Ct. at 2524.

A

The Supreme Court has held that the government has a substantial interest "in protecting a woman's freedom to seek lawful medical or counseling services in connection with her pregnancy." Madsen, 512 U.S. at 767, 114 S.Ct. at 2526; see Schenck, ___ U.S. at ___, 117 S.Ct. at 866. The Court has also indicated that a state has an interest in protecting medical privacy. The Court observed that targeted picketing of a clinic could threaten both the psychological and the physical well-being of a patient held "captive" by medical circumstance. Madsen, 512 U.S. at 768, 114 S.Ct. at 2526 (comparing the government's strong interest in residential privacy, acknowledged in Frisby v. Schultz, 487 U.S. 474, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988), with medical privacy).

The Phoenix ordinance serves such interests. On its face the ordinance seeks to protect the users of the clinic from "harassing or intimidating activity tending to impede . . . access to those facilities" and the "adverse physiological and emotional effects" of harassment. These substantial interests in allowing access, eliminating harassment and preventing intimidating activity will support a narrowly tailored ordinance.

B

The Schenck decision guides our review in determining whether the Phoenix ordinance is narrowly tailored. In that case, the Supreme Court considered, inter alia, floating buffer zones similar to the one imposed by the Phoenix ordinance. The injunction at issue in Schenck banned demonstration within fifteen feet of any person seeking to enter or leave a health care clinic. ___ U.S. at ___, 117 S.Ct. at 862. The injunction specified, however, that two persons could enter the floating buffer zones to attempt

"sidewalk counseling" unless they were asked to cease and desist. Id.

The Court struck down the floating buffer zones because "they burden more speech than is necessary to serve the relevant government interests."[2] Id. at ___ - ___, 117 S.Ct. at 866-67. The Court observed that *165 floating buffer zones prevent leafleting and communication at a normal conversational distance, both "classic forms of speech that lie at the heart of the First Amendment." Id. at ___ - ___, 118 S.Ct. at 867. Because this broad prohibition "floated", the court determined that demonstrators would have difficulty determining how to comply with the injunction:

> Protesters could presumably walk 15 feet behind the individual, or 15 feet in front of the individual while walking backwards. But they are then faced with the problem of watching out for other individuals entering or leaving the clinic. . . . [A]ttempts to stand 15 feet from someone entering or leaving a clinic and to communicate a message–certainly protected on the face of the injunction–will be hazardous if one wishes to remain in compliance with the injunction.

Id. The Court concluded that this lack of certainty about how to comply with the injunction created a substantial risk that more speech would be burdened than the injunction prohibited. Because other means might exist which would protect governmental interests and provide certainty regarding compliance, the Court held that the floating buffer zones

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[2] In Madsen, the Supreme Court stated that injunctions, as compared to content-natural, generally applicable statutes, require a "more stringent application of general First Amendment principles." Madsen, 512 U.S. at 765, 114 S.Ct. at 2524. The standard for injunctions is whether the challenged provisions burden no more speech than necessary to a serve a significant government interest. Id. at 765-67, 114 S.Ct. at 2525; Schenck, ___ U.S. at ___ - ___, 117 S.Ct. at 866-67.

burdened more speech than was necessary. Id. at ___, 117 S.Ct. at 868.

The Phoenix ordinance suffers the same defects as the injunction in Schenck. It contains a broad prohibition on speech with which it is difficult to comply without risking a violation of the ordinance. An individual within the access area to a clinic can invoke the eight-foot floating buffer zone, effectively preventing handbilling and normal conversation. Demonstrators who attempt communication with an individual must constantly monitor themselves to ensure that they don't encroach upon that individuals's or another individual's floating buffer zone. Further, the demonstrators are faced with the problem of determining which people within the access area have invoked the protection offered by the buffer zone.

An ordinance is narrowly tailored "if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." Frisby, 487 U.S. at 485, 108 S.Ct. at 2503. As in Schenck, a Phoenix demonstrator would encounter difficulty in knowing how to remain compliant. This uncertainty concerning compliance establishes a substantial risk that more speech will be eliminated than the ordinance itself prohibits. As such, the Phoenix ordinance lacks the narrow tailoring necessary to survive our scrutiny.[3]

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[3] Because we find that the Phoenix ordinance is not narrowly tailored, we need not decide whether it "leave[s] open ample alternative channels of communication." Ward, 491 U.S. at 791, 109 S.Ct. at 2753.

IV

We do not have the power to remedy the Phoenix ordinance. The ordinance contains no severability clause nor can the remainder of the ordinance function independently of the constitutionally infirm floating buffer provision. See Desert Outdoor advertising v. City of Moreno Valley, 103 F.3d 814, 821 (9th Cir.1996) (''whether partial invalidation is appropriate depends on the intent of the City in passing the ordinance and whether the balance of the ordinance can function independently.'' Id. (quotation omitted)). Indeed, the floating buffer provision is the only restriction on speech in the ordinance. Moreover, ''[c]onsistent with other constitutional norms, legislatures may draw lines which appear arbitrary without the necessity of offering a justification. But courts may not. We must justify the lines we draw.'' Planned Parenthood v. Casey, 505 U.S. 833, 870, 112 S.Ct. 2791, 2817, 120 L.Ed.2d 674 (1992) (opinion of O'Connor, Kennedy and Souter, JJ.).

V

The Phoenix Ordinance impermissibly encroaches on First Amendment freedoms and its enforcement should be enjoined. We affirm the district court's judgment.

AFFIRMED.

APPENDIX D

Chapter 9.99

ACCESS TO HEALTH CARE FACILITIES AND PLACES OF WORSHIP

Sections:

9.99.010 Definitions.
9.99.020 Impeding Access Prohibited.
9.99.030 Access to Driveway Areas.
9.99.040 Private Right of Action.

9.99.010

As used in this Chapter, the following terms and phrases shall have the indicated meanings:

A. ACCESS AREA. Any portion of a public street or other public place or any place open to the public within one hundred (100) feet of the premises of a health care facility or place of worship.

B. HEALTH CARE FACILITY. Any medical or health facility, hospital or clinic within the City which is licensed under State law or any building, office or other place within the City regularly used by any health care provider licensed under State law to provide medical, nursing, or health care or advice to patients. A health care facility includes but is not limited to any buildings, appurtenances and grounds, entrances, parking facilities, and driveways.

C. PLACE OF WORSHIP. A place of worship includes but is not limited to any buildings, appurtenances and grounds, entrances, parking facilities, and driveways where persons gather to worship when the same are used solely and exclusively for religious worship.

D. DEMONSTRATION ACTIVITY. All expressive and symbolic conduct, whether active or passive, which shall include, but not be limited to, protesting, picketing, distributing literature, and engaging in oral or silent protest, education or counselling activities.

E. DRIVEWAY AREA. That portion of a street right-of-way (including a sidewalk) generally improved for the purposes of providing vehicular access to adjacent private property. At the request of a health care facility or place of worship, the City of Santa Barbara will indicate (such as through the use of painted lines) the perimeter boundaries of the driveway area. (Ord. 4812, 1993.)

9.99.020 Impeding Access Prohibited.

A. DEMONSTRATION ACTIVITY - OBLIGATION TO WITHDRAW. No person, in the course of demonstration activity within the access area of a health care facility or place of worship, acting alone or in concert with others, shall impede or hamper the free access to or departure from any health care facility or place of worship by failing to withdraw immediately to a distance of at least eight (8) feet away from any person who has requested such withdrawal. ''Impede'' or ''Hamper'' means to obstruct, hinder or delay.

B. WITHDRAWAL. For purposes of this Section, withdrawal may be requested by a person verbally, or by carrying or wearing a visible sign clearly indicating such withdrawal request. Statements by a person, or signs carried or worn by a person displaying words or symbols such as or similar in effect to ''stop,'' ''stop it,'' ''withdraw,'' ''back off,'' ''get away,'' or ''leave me alone'' shall be sufficient to constitute to request to withdraw under this Section. Failure to comply immediately with any such request shall constitute a violation of this Section. Mere statements of opinion or disagreement made in the absence of a request to withdraw shall not be construed to be a request to withdraw under this Section.

C. DISTANCE. Distance under this Section shall be measured from that part of the closest demonstrator's body that is nearest to the closest part of the requesting person's body. For purposes of the preceding sentence, the term

"body" shall include any natural or artificial extension thereof, including, but not limited to, an outstretched arm or a handheld sign. (Ord. 4812, 1993.)

9.99.030 Access to Driveway Areas.

No person shall conduct any demonstration activity within the driveway area or within eight (8) feet of the driveway area of a health care facility or place of worship, provided however that it shall be lawful for a person to use a public sidewalk or street right-of-way adjacent to a health care facility or place of worship in order to traverse a driveway area. No person shall impede access to a driveway entrance of a health care facility or place of worship by any conduct which delays or impedes the flow of pedestrian or vehicular traffic in or out of such facility. (Ord. 4812, 1993.)

9.99.040 Private Right of Action

A. REMEDIES. Any person who is seeking or intends to seek access to a health care facility or place of worship and is aggrieved by an act prohibited by this Chapter may bring an action for damages, injunctive and/or declaratory relief, as appropriate, in a court of competent jurisdiction against any person who has violated, has conspired to violate or proposes to violate its provisions.

B. ATTORNEY FEES – CIVIL PENALTIES. Any person who prevails in such an action shall be entitled to recover from the violator those damages, costs, attorneys' fees and such other relief as determined by the court. In addition to all other damages, the court may award to the aggrieved person a civil penalty of up to One Thousand Dollars ($1,000) for each violation.

C. REMEDIES NOT EXCLUSIVE. The remedies provided by this Section are in addition to any other legal or equitable remedies the aggrieved person may have and are not intended to be exclusive. (Ord. 4812, 1993)

Supreme Court, U.S.
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No. 98-1074

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

CITY OF SANTA BARBARA,
Petitioner,
v.
VICKIE L. EDWARDS, KATHLEEN ROSE MCCAULLEY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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AMICUS CURIAE BRIEF OF THE CITY OF SAN JOSE, THE CITY AND COUNTY OF SAN FRANCISCO, THE CITY OF DINUBA, THE CITY OF HURON, THE CITY OF LAGUNA BEACH, THE CITY OF MONTEREY, THE CITY OF ORANGE COVE, THE CITY OF POWAY, THE CITY OF SAN LUIS OBISPO, THE CITY OF SUNNYVALE AND THE CITY OF THOUSAND OAKS IN SUPPORT OF THE PETITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-1074

CITY OF SANTA BARBARA,

Petitioner,

v.

VICKIE L. EDWARDS, KATHLEEN ROSE MCCAULLEY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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AMICUS CURIAE BRIEF OF THE CITY OF SAN JOSE, THE CITY AND COUNTY OF SAN FRANCISCO, THE CITY OF DINUBA, THE CITY OF HURON, THE CITY OF LAGUNA BEACH, THE CITY OF MONTEREY, THE CITY OF ORANGE COVE, THE CITY OF POWAY, THE CITY OF SAN LUIS OBISPO, THE CITY OF SUNNYVALE AND THE CITY OF THOUSAND OAKS IN SUPPORT OF THE PETITION

AUTHORITY TO FILE *AMICUS CURIAE* BRIEF

Amici curiae, eleven (11) local government entities, requested consent to file this brief from both the Petitioner, City of Santa Barbara, and Respondents, Vickie L. Edwards and Kathleen Rose McCaulley. Although the Petitioner provided its written consent, the Respondents have refused to do so. Accordingly, *amici curiae* file this brief pursuant to United States Supreme Court Rule 37.4, which provides that no motion for leave to file an *amicus*

curiae brief is necessary if the brief is presented on behalf of a city, county or town by its authorized law officer.

INTEREST OF *AMICI CURIAE*

Amici curiae are the following local government entities in the State of California: the City of San Jose, the City and County of San Francisco, the City of Dinuba, the City of Huron, the City of Laguna Beach, the City of Monterey, the City of Orange Cove, the City of Poway, the City of San Luis Obispo, the City of Sunnyvale and the City of Thousand Oaks.

Edwards v. City of Santa Barbara, 150 F.3d 1213 (9th Cir. 1995) ("*Edwards III*") is of great significance to *amici curiae* because it involves the constitutionality of carefully balanced legislation that addresses a difficult and increasingly widespread community problem: aggressive "in your face" protests. Although this modern protest tactic has occurred in a number of contexts, such as animal rights demonstrations and labor disputes, it has been most visibly associated with abortion-related demonstrations. Municipalities throughout the nation, including many of *amici*, have had to deal with frequent abortion-related demonstrations at health care facilities.[1] Although health care facility protesters wrap themselves in the cloak of the First Amendment, the reality is that the demonstrations involve harassment, intimidation, threats and violence (including murder) that far exceed legitimate areas of First Amendment free speech protection.

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[1] Responding to the abortion-related demonstrations has a very significant cost to municipalities. For example, *amicus curiae* the City of San Jose was one of the cities targeted as part of the "No Place To Hide" anti-abortion campaign occurring during the Summer of 1993. San Jose incurred unbudgeted costs and expenses of over $1.5 million in responding to the resulting demonstrations in order to protect its citizens from harm, keep the public peace and order, and safeguard the rights of patients seeking medical care and the free speech rights of the protesters and counter protesters.

The tactics of health care facility protesters tend to involve crowding around patients trying to enter health care facilities in an intimidating and obstructing manner. Protesters often wave signs and objects, such as plastic replicas of fetuses, at the patients in a threatening manner. They scream at patients, sometimes just inches from their faces, not to "kill" their babies and shout "murder, murder, murder" at patients. They point cameras at patients and photograph them, and record vehicle license plate numbers of patients. Protesters often become frenzied and start grabbing, tugging, pushing and shoving patients trying to enter health care facilities. In some instances, frenzied protesters have illegally entered health care facilities, knocking down employees and destroying medical supplies. Protesters often attempt to prevent access to health care facilities by surrounding vehicles, blocking the doors of the vehicles of arriving patients, and pounding on the windows and hoods of cars entering the facility parking lot.[2]

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[2] These and other tactics are well documented in the multitude of court decisions describing the relentless harassment that citizens from various municipalities have had to face. *See Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357, 362-364 (1997); *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 758-759 (1994); *American Life League, Inc. v. Reno*, 47 F.3d 642, 646 (4th Cir. 1995); *National Organization for Women v. Scheidler*, 968 F.2d 612, 615-616 (7th Cir. 1992), *rev'd* 510 U.S. 249 (1994); *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342, 1345-1346 (3rd Cir. 1989); *Portland Fem. Women's H. Ctr. v. Advocates for Life*, 859 F.2d 681, 683-684 (9th Cir. 1988); *U.S. v. Brock*, 863 F.Supp. 851, 855 (E.D. Wis. 1994); *Pro-Choice Network of Western New York v. Project Rescue of Western New York*, 799 F.Supp. 1417, 1421-1427 (W.D.N.Y. 1992), *aff'd in part and rev'd in part, Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1994); *Planned Parenthood v. Holy Angels Catholic Church*, 765 F.Supp. 617, 619-621 (N.D. Cal. 1991); *Feminist Women's Health Center v. Blythe*, 32 Cal.App.4th 1641, 1654-1656, 39 Cal.Rptr.2d 189, 194-195 (1995); *Bering v. SHARE*, 106 Wash.2d 212, 215-219, 721 P.2d 918, 921-923 (Wa. 1986).

A practice euphemistically called "sidewalk counseling" has emerged as part of these health care facility demonstrations. "Sidewalk counseling" consists of demonstrators foisting literature on health care facility patients in order to convince them not to undergo an abortion. *See Schenck v. Pro-Choice Network of Western New York,* 519 U.S. at 362-364; *Pro-Choice Network of Western New York v. Project Rescue of Western New York,* 799 F.Supp. at 1424-1425. "Sidewalk counselors" often attempt to accomplish their mission by harassing and intimidating the targeted patients. Even where "sidewalk counseling" starts off peacefully, the "counselors" often become angry and frustrated when patients persist in entering the health care facilities. *See Pro-Choice Network of Western New York v. Project Rescue of Western New York,* 799 F.Supp. at 1424-1425. As a result, the activities of the "sidewalk counselor" often degenerate into harassing, badgering, following, intimidating and yelling at patients in a threatening manner in order to dissuade them from entering the clinic even when a target repeatedly communicates a desire to be left alone. *See, e.g., Pro-Choice Network of Western New York v. Walker,* 994 F.2d 989, 992 (2nd Cir. 1993) (affirming a contempt judgment based on a "sidewalk counselor" impeding two women from entering a health care facility by pursuing them for an entire city block, yelling at them, crowding them and invading their personal space). Such conduct is not only upsetting to targeted patients, but also provides fertile ground for violent confrontations between demonstrators, counterdemonstrators and patients.

In the face of the above conduct, a number of municipalities, including some of *amici,* have adopted, or desire to adopt, a "move-back" or "back away" ordinance similar to the one adopted by the City of Santa Barbara.[3] The

[3] In addition to the City of Santa Barbara, other local governments adopting ordinances similar to Santa Barbara's move-back ordinance include the City of Phoenix in Arizona, the cities of San Jose, San Diego and Sunnyvale and the City and County of San Francisco in California, and the cities of Denver and Boulder

back-away ordinance represents a legislative decision about how best to balance the competing interests of promoting safe public demonstrations while protecting patients attempting to access health care facilities from nose-to-nose confrontations with demonstrators. The Ninth Circuit's opinion in *Edwards III* is of great concern to *amici curiae* because it unreasonably limits legislative authority and flexibility to address the problem of "in-your-face" protest tactics.

The impact of *Edwards III* on municipalities is heightened by the fact that it creates confusion for legislators. This Court's recent decisions in *Schenck v. Pro-Choice Network of Western New York, supra,* 519 U.S. 357, and *Madsen v. Women's Health Center, Inc., supra,* 512 U.S. 753, involved judicial review of injunctions that attempted to balance the competing interests of demonstrators and persons seeking access to health care facilities.

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in Colorado. City of Phoenix, Ariz., Municipal Code § 23-10.1; City of San Jose, Cal., Municipal Code § 10.08.030; City of San Diego, Cal., Municipal Code § 52.1001; City of Sunnyvale, Cal., Municipal Code §§ 9.94.010-9.94.030; City and County of San Francisco, Police Code §§ 4302-4303; City of Denver, Colo., Municipal Code § 38-114; City of Boulder, Colo., Municipal Code § 5-3-10.

The State of Colorado also has adopted a statute similar to Santa Barbara's move-back ordinance. Colo. Rev. Stat. § 18-9-122 (1996 Cum. Supp.) A First Amendment challenge to the constitutionality of the Colorado statute is currently pending before the Colorado Supreme Court in *Hill v. City of Lakewood.* The Colorado Court of Appeal first upheld the constitutionality of the Colorado statute in *Hill v. City of Lakewood,* 911 P.2d 670 (Colo.App. 1995). The United States Supreme Court subsequently decided *Schenck v. Pro-Choice Network of Western New York, supra,* 519 U.S. 357. The United States Supreme Court then granted a petition for *certiorari* to review the *Hill* decision. *Hill v. Colorado,* —— U.S. ——, 117 S.Ct. 1077 (1997). The United States Supreme Court subsequently remanded the *Hill* case to the Colorado Court of Appeal in light of the *Schenck* decision. On remand, the Colorado Court of Appeal distinguished *Schenck* and again upheld the constitutionality of the statute. 949 P.2d 107 (Colo.App. 1997) On January 12, 1998, the Colorado Supreme Court granted *certiorari* in the case.

In those cases, this Court explained that review of injunctions involving First Amendment rights are subject to more rigorous scrutiny than statutes or ordinances involving such rights. Applying this heightened scrutiny, this Court in *Schenck* and *Madsen* upheld broad "no speech" buffer zones that burden First Amendment speech to a far greater extent than the eight (8) foot move-back provision at issue in *Edwards III*. Thus, the decision of the Ninth Circuit in *Edwards III* creates confusion for local legislators regarding their authority to enact reasonable time, place and manner restrictions on First Amendment speech.

The significance of *Edwards III* to municipalities, such as *amici*, goes well beyond the context of health care facility demonstrations because municipalities face similar types of problems in a number of other contexts. *See, e.g., Krishna Society v. Lee*, 505 U.S. 672, 864 (1992) ("face-to-face solicitation presents risks of duress that are an appropriate target of regulation"). *Edwards III* improperly limits the ability of municipalities to respond to such community problems in a creative and effective manner. Given the significance of *Edwards III* to municipalities, *amici curiae* join together to urge this Court to grant the petition for writ of *certiorari* filed by the City of Santa Barbara and to reverse the judgment of the Ninth Circuit by affirming the authority of legislatures to foster public safety by prohibiting harassing and intimidating conduct involved in "in-your-face" protests.

WHY REVIEW SHOULD BE GRANTED

I. THE *EDWARDS III* DECISION IMPROPERLY LIMITS THE ABILITY OF LEGISLATURES TO ENACT REASONABLE TIME, PLACE AND MANNER RESTRICTIONS TO PROTECT PATIENTS FROM HARASSMENT RESULTING FROM IN-YOUR-FACE CONFRONTATIONS.

As discussed in the petition for writ of *certiorari* filed by the City of Santa Barbara, the Ninth Circuit in *Edwards III* relied exclusively upon its previous decision in *Sabelko*

v. City of Phoenix, 120 F.3d 161 (9th Cir. 1997) (*"Sabelko II"*), to invalidate Santa Barbara's move-back ordinance. 150 F.3d at 1217. In *Sabelko II,* the Ninth Circuit invalidated a City of Phoenix back-away ordinance very similar, although not identical, to Santa Barbara's ordinance. In doing so, the Ninth Circuit incorrectly applied the heightened standard for judicial review applicable to injunctions that burden speech set forth in *Madsen v. Women's Health Center, supra,* 512 U.S. at 764-766, and erroneously relied upon *Schenck v. Pro-Choice Network of Western New York, supra,* 519 U.S. 357. *See* 120 F.3d at 164-165. This Court should grant review to reverse the Ninth Circuit's erroneous decision, which dramatically undermines the authority of local governments.

A. The Ninth Circuit Failed To Analyze The Back-Away Ordinance Under The More Deferential Standard Of Review Applicable To Legislation.

In *Madsen v. Women's Health Center, supra,* 512 U.S. at 764-766, this Court recognized that content-neutral legislation is subject to a more deferential standard of review than injunctions. This differing standard is based upon the separation of powers that underlies the checks and balances built into our system of government. The trial courts craft injunctions, and the function of appellate courts is to review trial court actions. Accordingly, broader review of injunctions is appropriate. In contrast, it is the function of the legislature to enact generally applicable statutes reflecting broad policy choices about the promotion of particular societal interests. The judiciary does not have plenary powers of review over such legislative actions. *See, e.g., Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803); *Euclid v. Ambler Co.,* 272 U.S. 365, 395 (1926).

The Ninth Circuit in *Sabelko II* acknowledged that content-neutral legislation, such as the back-away provision, is subject to a more deferential standard of review.

120 F.3d at 164, fn. 2. However, the Ninth Circuit ultimately did not apply the more deferential standard, holding that the back-away ordinance was not narrowly tailored because the "uncertainty concerning compliance establishes a substantial risk that more speech will be eliminated than the ordinance itself prohibits." 120 F.3d at 165. Thus, the Ninth Circuit effectively required the content-neutral legislation to meet the same test of validity as an injunction, i.e., that the legislation burden "no more speech than necessary." *See Madsen v. Women's Health Center, supra,* 512 U.S. at 765.

In *Ward v. Rock Against Racism*, 491 U.S. 781, 798-799 (1989), this Court held that legislation need not set forth the least restrictive means to be narrowly tailored. It held that a regulation is narrowly tailored if it "promotes a substantial interest that would be achieved less effectively absent the regulation." *Id.* at 799. By failing to apply the more deferential standard of review applicable to content-neutral legislation, the Ninth Circuit in *Sabelko II* and *Edwards III* failed to give proper consideration to the separation of powers between the legislative and judicial branches. As a result, the Ninth Circuit has improperly limited the authority of *amici curiae* and other legislative bodies to enact time, place and manner restrictions to promote public safety by prohibiting harassing and intimidating conduct involved in "in-your-face" protests. Review must be granted to affirm the ability of legislatures to enact such regulations.

B. Contrary To The Ninth Circuit's Decision, *Schenck* Does Not Mandate The Conclusion That The Back-Away Provision Is Unconstitutional.

The Ninth Circuit in *Sabelko II* blindly and exclusively relied upon the discussion in *Schenck v. Pro-Choice Network of Western New York* of the "floating" buffer zone in concluding that the back-away ordinance also was not narrowly tailored. 120 F.3d at 169-165. In doing so, the Ninth

Circuit completely ignored the fact that this Court upheld the "cease and desist" requirement of the injunction at issue in *Schenck* as it applied to the fifteen (15) foot fixed buffer zones around the health care facility entrances. 519 U.S. at 381, fn. 11, 383-385. The "cease and desist" provision allowed two "sidewalk counselors" to enter the buffer zones until the targeted individual asked them to back away. 519 U.S. at 366, fn. 3. This is identical in material respects to the provisions of the back-away ordinance that permit a demonstrator to approach a targeted patient until requested by the target to move back to a more normal conversational distance.

This Court struck the fifteen (15) foot "floating" buffer zone at issue in *Schenck* based upon the conclusion that it was not narrowly taliored.[4] However, contrary to the implication of the Ninth Circuit's conclusion in *Sabelko II*, this Court did not hold in *Schenck* that all "floating" buffer zones are *per se* not narrowly tailored. To the contrary, in its discussion of the "floating" buffer zone, this Court in *Schenck* expressly did not decide whether the governmental interests involved would ever justify a zone of separation between individuals entering clinics and protesters, measured by the distance between the two. 519 U.S. at 377. This Court specifically acknowledged that the right to communicate is only the right to communicate from "an acceptable conversational distance." *Id.* at 377-378.

The Ninth Circuit's decision in *Sabelko II* also fails to recognize the material differences between the "floating" buffer zone at issue in *Schenck* and the back-away ordinance. This Court's conclusion that the "floating" buffer zone at issue in *Schenck* "burdens more speech than necessary to serve the relevant governmental interests" was

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[4] For this reason, this Court never reached the propriety of the "cease and desist" requirement in the context of the fifteen (15) foot "floating" buffer zone. *Id.* at 379.

based primarily on concerns about demonstrators knowing how to comply with the provision. 519 U.S. at 378-379. These concerns arose from the fact that the injunction at issue in *Schenck* created a fifteen (15) foot floating buffer around every person entering and leaving the health care facility enforceable against each protester. *Id.* This led the Court to conclude that demonstrators would have difficulty maintaining the fifteen (15) foot separation. *Id.*

Unlike the "floating" buffer at issue in *Schenck*, the back-away ordinance does not create a buffer around every person entering and leaving a health care facility. Rather, a demonstrator is allowed to approach a targeted patient until requested to move back. Critically, the eight (8) foot buffer need be maintained only as to the targeted patient. For example, assume that target one, who is entering a health care facility, has invoked the back-away ordinance against demonstrator one and target two, who is exiting the health care facility, has invoked the back-away ordinance against demonstrator two. It is not a violation of the back-away ordinance if demonstrator one, while communicating with target one, comes within eight (8) feet of target two.[5]

This Court also concluded that the fifteen (15) foot buffer zone in *Schenck* constituted a broad prohibition of speech because it prevented both communication from a "normal conversational distance" and handing leaflets to targeted patients. 519 U.S. at 377-378. Unlike the fifteen (15) foot buffer zone, the back-away ordinance does not

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[5] This Court in *Schenck* also noted that the "floating" buffer zone would be difficult to enforce because contempt proceedings likely would focus on whether protesters unknowingly strayed within the fifteen (15) foot buffer. 519 U.S. at 378, fn. 9. Under the back-away ordinance, this would be an evidentiary issue identical to the one trial courts frequently address in contempt proceedings involving the violation of a provision of a restraining order requiring one individual to stay a specified distance away from another specified individual.

burden speech. Until the provision is invoked, it does not prohibit demonstrators from approaching well within a "normal conversational distance" or closer of a targeted patient and offering the targeted patient leaflets. Even when invoked, the eight (8) foot distance is well within the bounds of a "normal conversational distance," and it does not prevent a demonstrator from offering leaflets to a targeted patient. The eight (8) foot distance requires speech to occur from a more appropriate, less threatening conversational distance from the recipient. *See infra,* pp. 11-13.

In short, *Schenck* did not resolve the issue of whether a back-away ordinance like the one at issue here is a narrowly tailored time, place and manner restriction. The erroneous reliance upon *Schenck* by the Ninth Circuit in *Sabelko II,* along with its failure to analyze the ordinance under the more deferential standard of review, resulted in a decision that dramatically undermines the authority of local governments. This Court should grant review to reverse the Ninth Circuit's erroneous decision.

II. REVIEW SHOULD BE GRANTED TO ESTABLISH THAT REQUIRING A DEMONSTRATOR TO COMMUNICATE FROM EIGHT (8) FEET AWAY FROM THE TARGETED PATIENT, UPON THAT PATIENT'S REQUEST, IS NOT A PROHIBITION ON SPEECH.

In *Sabelko II*, the Ninth Circuit mischaracterized the back-away ordinance as a "broad prohibition on speech" that effectively prohibits handbilling and normal conversation. 120 F.3d at 165. The legislative decision to require a demonstrator to withdraw to eight (8) feet upon the request of the targeted patient is based upon studies concluding that this is the minimum distance for "normal conversation" when being approached in public by a stranger. *See, e.g.*, Warren M. Hern, *Proxemics: The Application of Theory to Conflict Arising from Antiabor-*

tion Demonstrations, 12 Population and Environment: A Journal of Interdisciplinary Studies 379, 383-384 (1991) (communicating in public with a stranger from eight (8) feet reduces stress, discomfort, the impact of hostility, anger and the sense of being threatened, and enhances communication of the message); Mark L. Knapp, Nonverbal Communication in Human Interaction 130-131 (2d ed. 1978) (strangers should converse at greater distances apart).

The eight (8) foot zone does not prevent the demonstrator from continuing to communicate with the targeted patient. It does not prevent the demonstrator from offering the targeted patient a leaflet, or the targeted patient from accepting a leaflet if he/she chooses to do so. The back-away ordinance does not at all regulate the content of the message or the manner in which the message is conveyed, other than to require that it be conveyed from a distance of eight (8) feet if, and when, the targeted patient so requests. In short, the back-away ordinance recognizes that "in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment." *See Madsen v. Women's Health Center, supra,* 512 U.S. at 774. At most, the ordinance simply requires that speech occur from a minimal and somewhat less threatening distance from the unwilling recipient, regardless of the message being communicated or whether the targeted patient agrees or disagrees with the message.

As discussed above, this Court has recognized that face-to-face solicitation presents a risk of duress that is an appropriate subject of regulation. *See supra* p. 6. As also discussed above, *Schenck* did not foreclose consideration of all "floating" buffer zones and recognized that the right to communicate with an individual, even in a peaceful manner, is only from "an acceptable conversational distance." *See supra* p. 9. The case at bar pro-

vides this Court with the opportunity to provide *amici curiae* and other legislatures with guidance on whether an ordinance that requires, at most, communication from "an acceptable conversational distance" even constitutes a prohibition of speech.

III. THE FIRST AMENDMENT PRINCIPLE UNDERLYING THE *EDWARDS III* DECISION CONFLICTS WITH THOSE PRINCIPLES ARTICULATED BY THIS COURT IN *MADSEN* AND *SCHENCK*.

This Court in *Schenck v. Pro-Choice Network of Western New York* and *Madsen v. Women's Health Center, Inc.* held that, even under the more rigorous review applicable to injunctions, access to health care facilities could be protected by the use of broad "no speech" buffer zones without infringing on the First Amendment rights of demonstrators. In *Madsen*, this Court upheld a provision of an injunction completely prohibiting any First Amendment activity within thirty-six (36) feet of the property line of a health care facility. 512 U.S. at 769-770. This "no speech" buffer zone included public sidewalks and streets, and resulted in moving the demonstrators all the way across the street from the health care facility. *Id.* Likewise, in *Schenck* this Court upheld a fifteen (15) foot "no speech" buffer zone around the door entrances, parking lot entrances, driveways and driveway entrances of the health care facility. 519 U.S. at 380-385.

The First Amendment principle underlying the Ninth Circuit's decision in *Edwards III* is that "floating" buffer zones are a *per se* violation of the First Amendment. As discussed above, this principle is incorrect. *See supra* p. 9. Moreover, in the context of the case at bar, this principle is inherently inconsistent with those First Amendment principles relied upon in *Madsen* and *Schenck* because the eight (8) foot back-away provision does not burden speech like the "no speech" buffer zones upheld in those cases. Even assuming the back-away ordinance inadvertently infringes on speech, it clearly still does not

restrict as much speech as the broad "no speech" buffer zones upheld in *Madsen* and *Schenck*. This Court should grant review in this case to clearly establish that legislatures can choose less drastic measures than traditional "no speech" buffer zones to promote peaceful demonstrations and protect access to health care facilities.

CONCLUSION

Given the growing polarization of society on a number of sensitive issues and increasingly aggressive protest tactics, legislatures need to be able to act creatively and forcefully in order to effectively balance First Amendment rights against the countervailing rights at issue. *Edwards III* prevents legislatures from acting in such a manner by improperly limiting the authority of legislatures. Accordingly, *amici curiae* urge this Court to grant the petition for writ of *certiorari* filed by the City of Santa Barbara and to reverse the judgment of the Ninth Circuit in *Edwards III*.

Respectfully submitted,

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

1. Whether this Court should review a district court order where that order is still pending on appeal in a separate proceeding in the court of appeals, that appeal was not part of the decision for which petitioner seeks certiorari, and petitioner has not purported to petition for certiorari before judgment in the separate appeal which does address the order in question?

2. Whether an ordinance imposing "floating bubble zones" on public sidewalks is unconstitutional?

3. Whether an ordinance imposing restrictions on "[a]ll expressive and symbolic conduct, whether active or passive, which shall include, but not be limited to, protesting, picketing, distributing literature, and engaging in oral or silent protest, education or counseling activities," on portions of public sidewalks, is unconstitutional?

4. Whether the distinction in an ordinance between "words or symbols such as or similar in effect to 'stop' . . . or 'leave me alone,'" on the one hand, and "statements of opinion or disagreement," on the other, is an unconstitutionally vague basis for triggering a governmentally enforced audience veto on speech in traditional public fora?

PARTIES

The City of Santa Barbara, petitioner in No. 98-1074, is the respondent in No. 98-1025. Vickie Edwards and Kathleen McCaulley, respondents in No. 98-1074, are the petitioners in No. 98-1025.

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No. 98-1074

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

CITY OF SANTA BARBARA,
Petitioner,

v.

VICKIE L. EDWARDS AND KATHLEEN ROSE MCCAULLEY,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION

INTRODUCTION

The underlying litigation in this case involves a constitutional challenge to two separate provisions of an ordinance of the City of Santa Barbara, California. One provision imposes bans on "demonstration activity" along stretches of the public sidewalks adjacent to any "health care facility" or "place of worship." This "demonstration ban" is addressed in the petition for certiorari docketed as No. 98-1025 in this Court. A second provision imposes floating speech-free bubble zones within 100 feet of any "health care facility" or "place of worship." That provision is addressed in the petition for certiorari -- opposed herein -- docketed as No. 98-1074.

The district court preliminarily enjoined the "demonstration ban" in its entirety, Pet. App. E in No. 98-1025, but the Ninth Circuit reversed, Pet. App. A in No. 98-1025.[1] Accordingly, the petitioners in No. 98-1025 are plaintiffs Vickie Edwards and Kathleen McCaulley.

The "floating bubble" ordinance was preliminarily enjoined in two stages, in two separate district court decisions, which led to two separate appeals in the Ninth Circuit, one of which is still pending. First, the district court enjoined the "floating bubbles" as applied to "places of worship." Pet. App. 59a in No. 98-1025. The City appealed that order. Second, after the City took its appeal from the first ruling, but before the Ninth Circuit decided that appeal, the district court enjoined the "floating bubbles" as applied to "health care facilities." Resp. App. 1 in No. 98-1074. The City appealed that order as well, and at the City's request, that second appeal was stayed. Resp. App. 2 in No. 98-1074. That second appeal has not yet been decided. In the first appeal, the Ninth Circuit affirmed in pertinent part, i.e., rejected the City's appeal from the preliminary injunction against floating bubble zones outside places of worship. Pet. App. A in No. 98-1074. Accordingly, the petitioner in No. 98-1074 is the defendant City of Santa Barbara.

OPINIONS BELOW

The petitioner City of Santa Barbara ("City") has not listed all of "the official and unofficial reports of the opinions and orders entered in the case by courts," as required by this Court's rules. *See* Sup. Ct. R. 14.1(d). Rather, the City lists

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[1] "Pet. App." refers to an appendix to a petition for certiorari. "Resp. App." refers to the appendix to the respondents' Brief in Opposition.

only the August 11, 1998 decision of the Ninth Circuit. This omission materially misrepresents the history of the litigation. The course of this somewhat complicated case is therefore set forth *infra*, in respondents' Counter-Statement of the Case.

All decisions in this litigation to date are entitled *Edwards v. City of Santa Barbara*. The decision of the district court initially denying a preliminary injunction is unreported. Pet. App. B in No. 98-1025. The decision of the district court granting the renewed motion for preliminary injunction is reported at 883 F. Supp. 1379 (C.D. Cal. 1995). Pet. App. C in No. 98-1025. The order of the Ninth Circuit vacating and remanding is noted at 70 F.3d 1277 (9th Cir. 1995). Pet. App. D in No. 98-1025. The *first* decision of the district court reissuing the preliminary in part is unreported. Pet. App. E in No. 98-1025. The *second* decision of the district court reissuing the preliminary injunction in remaining part is unreported. Resp. App. 1. The decision of the Ninth Circuit affirming in part and reversing in part the *first* partial reissuance of the preliminary injunction is reported at 150 F.3d 1213 (9th Cir. 1998). Pet. App. A in No. 98-1025. The order of the Ninth Circuit denying rehearing is unreported. Pet. App. H in No. 98-1025. There has been no decision to date in the Ninth Circuit on the City's appeal from the *second* partial reissuance of the preliminary injunction. The Ninth Circuit's order staying proceedings in that appeal is unreported. Resp. App. 2.

JURISDICTION

Petitioner's statement of jurisdiction is incomplete. The constitutional merits of the ordinance provision at issue in No. 98-1074 -- creating floating bubble zones outside any "health care facility" or "place of worship" -- was the subject of two separate district court decisions and two separate appeals to the Ninth Circuit, only one of which has been decided. Petitioner

mentions only the appeal which was decided. As to the other appeal, petitioner could only seek certiorari before judgment. *See* Sup. Ct. R. 11; 28 U.S.C. § 1254(1).[2]

CONSTITUTIONAL PROVISIONS AND ORDINANCE

Petitioner's listing of constitutional provisions and ordinances involved is incomplete. The text of the First and Fourteenth Amendments to the United States Constitution are set forth in Appendix I to the Petition in No. 98-1025. The text of Ordinance No. 4812 of the City of Santa Barbara is set forth in full in Appendix J to the Petition in No. 98-1025.

COUNTER-STATEMENT OF THE CASE

1. Background

Respondents Vickie L. Edwards and Kathleen Rose McCaulley ("Edwards and McCaulley) have engaged in a variety of expressive activities -- distributing leaflets, one-on-one verbal counseling, carrying signs -- on public sidewalks in the vicinity of abortion facilities in Santa Barbara, California. Edwards and McCaulley have at all times conducted themselves in a peaceful and law-abiding manner.

2. Ordinance

On May 18, 1993, the petitioner City of Santa Barbara ("City") adopted the ordinance challenged in the case at bar.

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[2]The City does *not* in fact seek certiorari before judgment. The petition explicitly seeks review of "the judgment and opinion of the . . . Ninth Circuit entered on August 11, 1998." Pet. at 1. *See also* Pet. at 7 ("This Petition seeks review *only* of the portion of the *Ninth Circuit decision* enjoining enforcement of the eight foot back away provision") (emphasis added).

The ordinance ("Ord.") that the City enacted imposes two forms of restrictions on speech, a "demonstration ban" provision (or "driveway provision"), and a "floating bubble" (or "floating buffer") zone provision. Edwards and McCaulley have challenged both provisions under the First and Fourteenth Amendments.

Both ordinance provisions apply to "demonstration activity," which the ordinance defines as follows:

> DEMONSTRATION ACTIVITY. *All expressive and symbolic conduct, whether active or passive*, which shall include, but not be limited to, protesting, picketing, distributing literature, and engaging in oral or silent protest, education or counseling activities.

Ord. § 9.99.010(D) (emphasis added).

a. "Demonstration ban"

The "demonstration ban" states:

> No person shall conduct any *demonstration activity* within the driveway area or within eight (8) feet of the driveway area of a health care facility or place of worship, provided however that it shall be lawful for a person to use a public sidewalk or street right-of-way adjacent to a health care facility or place of worship in order to traverse a driveway area.

Ord. § 9.99.030 (emphasis added).[3] The "driveway area" where the demonstration ban applies includes the public sidewalk crossing a driveway. Ord. § 9.99.010(E). By its terms, the demonstration ban covers the "driveway area" itself, plus the public sidewalk within eight feet of that driveway in any direction. Ord. § 9.99.030. Hence, the ordinance bans "demonstration activity" along stretches of sidewalk extending some twenty-five to thirty feet or more in length, depending upon the width of the "driveway area."

---

[3] "**Driveway area**" is defined as:

> DRIVEWAY AREA. That portion of a street right-of-way (including a sidewalk) generally improved for the purposes of providing vehicular access to adjacent private property. At the request of a health care facility or place of worship, the City of Santa Barbara will indicate (such as through the use of painted lines) the perimeter boundaries of a driveway area.

Ord. § 9.99.010(E). "**Health care facility**" is defined as:

> HEALTH CARE FACILITY. Any medical or health facility, hospital or clinic within the City which is licensed under State law or any building, office or other place within the City regularly used by any health care provider licensed under State law to provide medical, nursing, or health care or advice to patients. A health care facility includes but is not limited to any buildings, appurtenances and grounds, entrances, parking facilities, and driveways.

Ord. § 9.99.010(B). "**Place of worship**" is defined as:

> PLACE OF WORSHIP. A place of worship includes but is not limited to any buildings, appurtenances and grounds, entrances, parking facilities, and driveways where persons gather to worship when the same are used solely and exclusively for religious worship.

Ord. § 9.99.010(C).

b. "Floating bubble zone"

The floating bubble zone provision applies in an "access area," which is defined as

> **A. ACCESS AREA.** Any portion of a public street or other public place or any place open to the public within one hundred (100) feet of the premises of a health care facility or place of worship.

Ord. § 9.99.010(A). The floating zone provision states:

> **A. DEMONSTRATION ACTIVITY – OBLIGATION TO WITHDRAW.** No person, in the course of *demonstration activity* within the access area of a health care facility or place of worship, acting alone or in concert with others, shall impede or hamper the free access to or departure from any health care facility or place of worship by failing to withdraw immediately to a distance of at least eight (8) feet away from any person who has requested such withdrawal. "Impede" or "Hamper" means to obstruct, hinder or delay.
>
> **B. WITHDRAWAL.** For the purposes of this Section, withdrawal may be requested by a person verbally, or by carrying or wearing a visible sign clearly indicating such withdrawal request. Statements by a person, or signs carried or worn by a person displaying words or symbols such as or similar in effect to "stop," "stop it," "withdraw," "back off," "get away," or "leave me alone" shall be sufficient to constitute a violation of this Section. Mere statements of opinion or disagreement made in the absence of a request to withdraw shall not be construed to be a request under

this Section.

C. DISTANCE. Distance under this Section shall be measured from that part of the closest demonstrator's body that is nearest to the closest part of the requesting person's body. For purposes of the preceding sentence, the term "body" shall include any natural or artificial extension thereof, including, but not limited to, and outstretched arm or handheld sign.

Ord. § 9.99.020 (emphasis added).

3. Course of litigation

Edwards and McCaulley filed suit in the United States District Court for the Central District of California, challenging the constitutionality of the demonstration ban and the floating zones and alleging that these restrictions chilled and burdened their expressive activities. The district court had jurisdiction under 28 U.S.C. §§ 1331, 1343.

The district court initially declined to grant a preliminary injunction. Pet. App. B in No. 98-1025. Upon consideration of a renewed motion, filed after discovery was conducted, the district court enjoined enforcement of both the demonstration ban and the floating bubble zones. App. C in No. 98-1025.

In its analysis, the district court explained that, under the "extraordinarily broad language" of the definition of "demonstration activity," the ordinance "applies to all conceivable expression." Pet. App. 27a n.6 in No. 98-1025. The demonstration ban (which the district court called the "Driveway Provision") therefore bans

all expressive activity, whether peaceful or harassing,

> vocal or silent, . . . within the eight-foot zone on either side of the driveway leading to the clinic . . ., even silent prayer or expressive t-shirts . . . .
>
> It is axiomatic in American constitutional jurisprudence that the state cannot prohibit all protected forms of expressive activity in a public forum. *See, e.g., Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 575 (1987) ("We think it obvious that such a ban cannot be justified even if LAX were a nonpublic forum because no conceivable governmental interest would justify such an absolute prohibition of speech") . . . .

Pet. App. 37a-38a in No. 98-1025.

The district court concluded:

> In this case, the Driveway Provision fails to pass muster under the First Amendment because it incorporates the constitutional infirmity of the Ordinance's overbroad definition of demonstration activity and thereby criminalizes the entire universe of expressive activity.

Pet. App. 42a in No. 98-1025.

Turning to the floating zones, the district court noted that these zones apply to "demonstration activity." Pet. App. 43a in No. 98-1025. Thus, "[t]o the extent that the definition of 'demonstration activity' is overbroad, the Bubble Zone provision suffers from the same constitutional infirmity," *id.* Furthermore, the floating zones literally only apply to those engaged in demonstration activity (i.e., expression), and to this extent the ordinance "impermissibly singles out expressive activity" for restriction. *Id.* at 43a n.16. More fundamentally,

the district court held the floating zones to be unconstitutionally overbroad. *Id.* at 45a-49a. The floating zones limit protected speech on the basis of "subjective listener reaction," *id.* at 47a, thus conferring a governmentally enforced audience veto on the speaker's expression in public places, *id.* at 46a, 48a.

The City appealed, and the Ninth Circuit vacated and remanded in light of its own erroneous -- but at the time, not yet corrected -- decision in another case, *Sabelko v. City of Phoenix*.[4] *See Edwards v. City of Santa Barbara*, 70 F.3d 1277 (9th Cir. 1995). Pet. App. D in 98-1025.

On remand, the district court again enjoined enforcement of the "demonstration ban" (or "driveway provision"). App. E in No. 98-1025. As for the "floating zones" (or "bubble zones"), the district court enjoined that provision only as applied to "places of worship," and *not* as applied to "health care facilities." *Id.* at 59a. (The district court felt constrained by the intervening *Sabelko* decision to uphold the floating zones as applied to "health care facilities." *Id.* at 67a-69a.)

The City appealed again.

While the City's appeal was pending, this Court decided *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997), which overturned "floating zones" in an injunction. In light of *Schenck*, this Court vacated, and remanded for further consideration, the Ninth Circuit's *Sabelko* ruling. On remand, the Ninth Circuit reversed itself and overturned the ordinance

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[4]In *Sabelko*, the Ninth Circuit upheld an ordinance imposing floating bubble zones. After remand from this Court, the Ninth Circuit reversed itself. *See Sabelko v. City of Phoenix*, 68 F.3d 1169 (9th Cir. 1995), *vacated*, 519 U.S. 1144 (1997), *on remand*, 120 F.3d 161 (9th Cir. 1997).

imposing floating zones at issue in *Sabelko*. Pet. App. C in No. 98-1074. Plaintiffs Edwards and McCaulley then went back into district court in the present case and secured a preliminary injunction against the Santa Barbara ordinance "as it applies to health care facilities," Resp. App. 1 in No. 98-1074. (This was the only challenged portion of the ordinance *not* enjoined in the district court's prior order on remand. *See* App. E in No. 98-1025.)

The City appealed once more. However, at the City's request, this latest appeal was stayed pending judgment in the City's prior appeal. Resp. App. 2 in No. 98-1074.

In that prior appeal, the Ninth Circuit then proceeded to affirm in part and reverse in part. *Edwards v. City of Santa Barbara*, 150 F.3d 1213 (9th Cir. 1998). Pet. App. A in No. 98-1025. The Ninth Circuit reversed as to the demonstration ban, i.e., upheld the restriction. *Id.* at 5a-6a. The court affirmed as to the floating zones outside places of worship, i.e., struck down that provision. *Id.* at 6a. (The Ninth Circuit noted that the question of the constitutionality of floating zones outside health care facilities was not part of the appeal it was deciding but rather had been the subject of subsequent district court proceedings. *Id.* at 5a n.5. Hence, the Ninth Circuit did not decide that issue, which remained pending in a separate appeal. *See* Resp. App. 2 in No. 98-1074.)

Edwards and McCaulley filed a timely petition for rehearing as to the demonstration ban, which the Ninth Circuit denied. Pet. App. H in 98-1025.

Edwards and McCaulley next filed a petition for a writ of certiorari (No. 98-1025) on the constitutionality of the "demonstration ban." The City followed with its own petition for certiorari (No. 98-1074) on the floating zones.

REASONS FOR DENYING THE WRIT

This Court should deny the City's petition for certiorari for the following reasons:

- The City's petition does not comply with this Court's rules.

- The City's petition does not request review before judgment, yet the issue the petition addresses (floating bubble zones outside "health care facilities") was not decided by the Ninth Circuit; rather, that issue is the subject of a separate appeal not yet decided by the court below.

- There is no conflict warranting review.

- The decision below was plainly correct insofar as it overturned "floating bubble zones" on public sidewalks.

- The decision below is fully justifiable on additional, alternative grounds.

I. THE CITY'S PETITION DOES NOT COMPLY WITH THIS COURT'S RULES.

Noncompliance with this Court's rules justifies the denial of certiorari:

> The failure of a petitioner to present with accuracy, brevity, and clarity whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny

a petition.

Sup. Ct. R. 14.4. The City's petition is defective in multiple respects. Most notably, the petition fails to mention or include in the appendix several important decisions in the lower courts, contrary to Rules 14.1(d) and 14.1(i)(ii). The petition fails to mention, *contra* Rule 14.1(e), that the issue to which the City's arguments are devoted -- the constitutionality of floating bubble zones outside "health care facilities" -- was *not* before the Ninth Circuit in the appeal that court decided but rather was -- and is -- the subject of a *separate* appeal still pending in that court. As noted earlier, the listing of constitutional provisions and statutes involved is incomplete, *contra* Rule 14.1(f), and the statement of the case is incomplete to the point of being positively misleading, *contra* Rule 14.1(g). (The City mentions that it appealed twice from district court injunctions issued after the Ninth Circuit's initial remand. Pet. at 6, 7. The City fails to mention that the second appeal was *not* consolidated with the first and has *not* been decided by the Ninth Circuit. *See generally* Respondents' Counter-Statement of the case, *supra*.)

II. THE CITY DOES NOT SEEK OR CLAIM TO SEEK CERTIORARI BEFORE JUDGMENT AND IN ANY EVENT DOES NOT MAKE A SHOWING OF IMPERATIVE PUBLIC IMPORTANCE IN IMMEDIATE DETERMINATION BY THIS COURT.

The City's petition is devoted almost exclusively to the question of the constitutionality of floating bubble zones outside "health care facilities." That portion of the ordinance, however, was *not* enjoined by the district court and *not* addressed by the Ninth Circuit in the decision for which petitioners seek review. *See* Pet. App. 59a in No. 98-1025; Pet. App. 5a n.5 in No. 98-1074. Rather, that provision was enjoined in a later order, Resp.

App. 1, which is the subject of a separate appeal still pending in the Ninth Circuit, Resp. App. 2.

At best, then, the City's petition *could* have sought certiorari, before judgment, in that *different* case, still pending before the Ninth Circuit. The City failed even to mention that other appeal in its petition, however. On the contrary, the City expressly limited its petition to seeking review of the Ninth Circuit's *decision* which overturned the floating zones *outside places of worship, not health care facilities*. *Supra* note 2. In any event, certiorari before judgment is disfavored and

> will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court.

Sup. Ct. R. 11. The City has not even attempted to make such an extraordinary showing.

III. THERE IS NO CONFLICT WARRANTING REVIEW.

The City has identified no conflict in the circuits on the constitutionality of floating anti-speech bubble zones. On the contrary, the circuits and the state courts are uniform in rejecting such zones. *See Lucero v. Trosch*, 121 F.3d 591, 607 (11th Cir. 1997) (overturning "floating 20-foot buffer zone" provision of injunction in light of *Schenck*); *Planned Parenthood Ass'n of San Mateo County v. Operation Rescue of California*, 50 Cal. App. 4th 290, 303-04, 57 Cal. Rptr. 2d 736, 744 (1996) (overturning injunctive provision forbidding "'approaching'" abortion business staff or patients "'once that person has made it unmistakably clear that he or she does not wish to be approached'" because that provision "limits speech to that

consented to by the listener" and burdens "peaceable but unwelcome" speech), *cert. denied*, 118 S. Ct. 54 (1997); *Sabelko v. City of Phoenix*, 120 F.3d 161, 163 n.1, 165 (9th Cir. 1997) (overturning eight-foot "floating buffer provision" in ordinance because it imposes "a broad prohibition on speech with which it is difficult to comply" and gives audience veto power "effectively preventing handbilling and normal conversation"). *See also United Food and Commercial Workers Int'l Union v. IBP, Inc.*, 857 F.2d 422, 425 n.4, 435 (8th Cir. 1988) (overturning statutory ban on "'persisting in talking to or communicating in any manner with'" a person or persons "'against his, her or their will'" in order to persuade that person or persons to quit or refrain from seeking certain employment: "as written this clause plainly runs afoul of the First Amendment"); *Fargo Women's Health Organization, Inc. v. Lambs of Christ*, 488 N.W.2d 401, 407 n.1, 411 (N.D. 1992) (overturning, as violative of the First Amendment, an injunctive ban on "'speaking to staff and patients . . . who indicate that they do not wish to be spoken to'" and "'distributing leaflets or brochures to any person who has indicated orally or by gesture that such person does not wish to receive such literature'").[5]

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[5]One lower court strayed twice from this consensus, and the matter is now pending before the Supreme Court of Colorado. *Hill v. City of Lakewood*, 911 P.2d 670 (Colo. Ct. App. 1995), *vacated sub nom. Hill v. Colorado*, 519 U.S. 1145 (1997), *on remand*, 949 P.2d 107 (Colo. Ct. App. 1997), *cert. granted, id.* (Colo. argued Oct. 19, 1998). Should that state supreme court depart from the consensus and uphold the floating bubble zone statute at issue, review of that case would be appropriate. But that conflict has not yet materialized, nor should this Court assume that the Supreme Court of Colorado will fail to be as vigilant as the other lower courts (and this Court) in rejecting floating anti-speech zones.

IV. THE DECISION BELOW WAS PLAINLY CORRECT.

In *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994), this Court struck down an injunctive version of floating personal no-speech zones. That "no approach" provision forbade "physically approaching any person seeking services" at an abortion business "unless such person indicates a desire to communicate," *id.* at 760. This injunctive provision applied to *all* communications, however peaceful. Further, this restriction made the speakers' right to communicate dependent upon the consent of the audience. This Court held that these features doomed the *Madsen* "no approach" provision:

> [I]t is difficult, indeed, to justify a prohibition on *all* uninvited approaches of persons seeking the services of the clinic, regardless of how peaceful the contact may be, without burdening more speech than necessary to prevent intimidation and to ensure access to the clinic. Absent evidence that the protesters' speech is independently proscribable (i.e., "fighting words" or threats), or is so infused with violence as to be indistinguishable from a threat of physical harm, . . . this provision cannot stand. As a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment. . . . The "consent" requirement alone invalidates this provision; it burdens more speech than is necessary to prevent intimidation and to ensure access to the clinic.

Id. at 774 (internal quotation marks, citations, and footnote omitted; emphasis in original).

In *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997), this Court struck down another floating bubble zone, this one also contained within an injunction. This provision banned "demonstrating . . . within fifteen feet of any person or vehicle seeking access" to abortion businesses, subject to an exception for two sidewalk counselors. *Id.* at 366 n.3. The audience had the power to veto even these two counselors' speech, at which point the fifteen-foot no-speech bubble would apply to these speakers as well. *Id.* Despite a record of "extraordinary" lawlessness by protesters, *id.* at 383, 377, this Court invalidated a floating zone imposed upon the very persons found to have engaged in misconduct.

> The floating buffer zones prevent defendants -- except for two sidewalk counselors, while they are tolerated by the targeted individual -- from communicating a message from a normal conversational distance or handing leaflets to people entering or leaving the clinics who are walking on the public sidewalks. This is a broad prohibition, both because of the type of speech that is restricted and the nature of the location. Leafletting and commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment, and speech in public areas is at its most protected on public sidewalks, a prototypical example of a traditional public forum. . . . We need not decide whether the governmental interests involved would ever justify some sort of zone of separation between individuals entering the clinics and protesters, measured by the distance between the two. We hold here that *because this broad prohibition on speech "floats,"* it cannot be sustained on this record.

Id. at 377 (emphasis added). This Court went on to catalogue the nightmarish difficulty of complying with floating zones. *Id.*

at 377-78. "This lack of certainty leads to a substantial risk that much more speech will be burdened than the injunction by its terms prohibits." *Id.* at 378.

The ordinance in the present case imposes floating bubble zones that plainly violate the norms of *Madsen* and *Schenck*. As in *Madsen* and *Schenck*, the challenged zones restrict even entirely peaceful speech.[6] The floating zones make leafletting impossible. (This is clearly deliberate. The ordinance explicitly measures the eight-foot no-speech zone from any "outstretched arm," Ord. § 9.99.020(C), i.e., from a hand offering a leaflet.) As in *Madsen* and *Schenck*, the challenged zones subject the speaker to the consent of the listener, i.e., impose an audience veto on speech in a public forum sidewalk. And, as in *Schenck*, the zones "float" with the person invoking the bubble, making compliance exceedingly difficult and thereby burdening even more speech.[7]

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[6]A separate provision of the Santa Barbara ordinance provides:

> No person shall impede access to a driveway entrance of a health care facility or place of worship by any conduct which delays or impedes the flow of pedestrian or vehicular traffic in or out of such facility.

Ord. § 9.99.030. Edwards and McCaulley do not challenge this provision. Pet. App. 44a n.17 in No. 98-1025; *id.* at 60a n.2. Hence, the City's constant refrain about the need to remedy obstruction and interference is purely a red herring. *See* Pet. at 4-5 & n.1, 8-17. Moreover, the misconduct allegedly perpetrated was by people other than Edwards and McCaulley. Pet. at 5 n.2. The United States is not a nation where the misconduct of *some* people justifies the suspension of the free speech rights of *all* people. *See, e.g., NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

[7]The City's efforts to distinguish *Schenck* fail. The City argues that under the Santa Barbara ordinance, a floating bubble zone ban on leafletting and

(continued...)

The City makes much of the fact that injunctions trigger a higher standard of scrutiny than ordinances. *See Madsen*, 512 U.S. at 765. But the concerns this Court identified as constitutional flaws in the floating zones in *Madsen* and *Schenck* -- overbreadth, vagueness, imposition of a listener consent requirement -- are also fatal to ordinances and statutes. *E.g.*, *Thornhill v. Alabama*, 310 U.S. 88 (1940) (overbreadth doomed statute); *Kolender v. Lawson*, 461 U.S. 352 (1983) (vagueness doomed statute); *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992) (risk of audience veto doomed ordinance). If anything, the present ordinance *more flagrantly* violates the constitutional right to free speech because it *restricts everybody*, not just those particular individuals whom a court has adjudicated as lawbreakers or abusers of the right to protest.[8]

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[7](...continued)
conversation only becomes effective upon request, only applies to the requesting individual, and may be waived to allow acceptance of a leaflet. Pet. at 15. But the same was true in *Schenck*. *See* 519 U.S. at 364 & n.1, 366 n.3, 367, 377.

[8]The City misleadingly states that the ordinance "requires a demonstrator *who is impeding access* . . . to back off eight feet if a person specifically requests the space." Pet. at 4 (emphasis added). *See also id.* at 12 (falsely implying ordinance only applies to an "obstructive protester"); *id.* at 16 (same). In fact, the ordinance applies to *any* person "in the course of demonstration activity," Ord. § 9.99.020(A), and categorically *deems* the "fail[ure] to withdraw immediately to a distance of eight (8) feet" *to be* "imped[ing] . . . access," *id.* The ordinance thus equates "failing to withdraw" with "impeding," as the district court noted. Pet. App. at 44a n.18 in No. 98-1025. *See also* Appellant City's Opening Brief in *Edwards v. City of Santa Barbara*, Nos. 96-56790, 96-56262, 96-56558 (Dec. 2, 1996), at 33 (City admits that floating zones of Santa Barbara ordinance impose "eight-foot 'no speech' proscriptions effective within 100 feet of these special places").

V. THE DECISION BELOW IS ALSO FULLY SUPPORTABLE ON ALTERNATIVE GROUNDS.

Review is also unwarranted because the floating bubble zone ordinance here already suffers from additional constitutional defects that require its invalidation. Thus, the judgment below would have to be affirmed in any event on alternative grounds.

The floating zones apply only to people "in the course of demonstration activity," i.e., these zones burden speech and only speech. Ord. § 9.99.020(A). The speech in question -- demonstration activity -- is defined to encompass the universe of expression, including even t-shirts, buttons, leafletting, and "silent protest." *See* Ord. § 9.99.010(D). Hence, the floating bubble zones incorporate -- and burden -- a class of speech that covers the universe of expressive activity. Pet. App. 27a n.6, 37a-42a in No. 98-1025. A provision that "criminalizes the entire universe of expressive activity," *id.* at 42a, cannot pass muster even in a nonpublic forum, *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987), much less in a traditional public forum sidewalk.

Finally, the ordinance imposes criminal liability based upon an unconstitutionally vague distinction. A listener's "words or symbols such as or similar in effect to 'stop,' . . . 'back off,' 'get away,' or 'leave me alone'" count as a request which triggers the floating zones, Ord. § 9.99.010(B), while "[m]ere statements of opinion or disagreement" do *not* trigger a zone, *id.* This "distinction" is obscure in theory as well as in practice. For example, "Get out of here" could easily mean either "I'm not convinced" or "Please leave." A wave of the hand can be even more ambiguous. The speaker, however, risks criminal (and civil) liability for incorrectly interpreting these and a myriad of other "words or symbols." Hence, the floating

zones are unconstitutionally vague.

CONCLUSION

This Court should deny the City's petition in No. 98-1074.

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February 3, 1999

APPENDICES

APPENDIX 1

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 94-2243 RSWL

VICKIE L. EDWARDS, *et al.*,

Plaintiffs,

v.

CITY OF SANTA BARBARA, *et al.*,

Defendants.

ORDER GRANTING A PRELIMINARY INJUNCTION

Lodged September 26, 1997
Signed October 6, 1997
Entered October 7, 1997

Pursuant to notice, plaintiffs' motion for a preliminary injunction to enjoin enforcement of the Bubble Provision, § 9.99.020, of Santa Barbara Ordinance No. 4812, as it applies to health care facilities, came on for hearing on September 15, 1997. Based on the Court's review and consideration of the record in this case, and of the moving, opposition, and reply papers, and good cause found therefore, this Court finds that the Bubble Provision (§ 9.99.020) of Santa Barbara Ordinance No.

4812, as it applies to health care facilities, violates the Free Speech Clause of the First Amendment of the United States Constitution. The Court further finds that the plaintiffs have satisfied the requirements for a preliminary injunction; to wit, the plaintiffs have demonstrated a likelihood of success on the merits, and have suffered and will continue to suffer irreparable injury unless a preliminary injunction is granted.

THEREFORE, IT IS HEREBY ORDERED that:

1. The plaintiffs' motion for a preliminary injunction enjoining enforcement of the Bubble Provision, § 9.99.020, of Santa Barbara Ordinance No. 4812, as it applies to health care facilities, is **GRANTED**;

2. The surety bond previously given by the plaintiffs shall be adequate security for the preliminary injunction.

IT IS SO ORDERED.

Dated: Oct. 6, 1997

/s/ Ronald S. W. Lew
Ronald S. W. Lew
United States District Judge

APPENDIX 2

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 97-56485

VICKIE L. EDWARDS, *et al.*,

Plaintiffs-Appellees,

vs.

CITY OF SANTA BARBARA,

Defendant-Appellant.

and

HAL CONKLIN, in his official capacity as Mayor of the City of Santa Barbara, *et al.*,

Defendants.

ORDER

Filed December 9, 1997

Before: Peter L. Shaw, Appellate Commissioner

Appellant's motion to stay appellate proceedings is granted in part.

This appeal is stayed pending entry of judgment in appeal nos. 97-56790, 96-56262, and 96-56558. Within seven days from the entry of judgment in these consolidated cases, appellant shall notify this court of the entry to facilitate docketing of the briefing schedule in this appeal.

Appellant's opening brief is due 21 days after the entry of judgment in appeal nos. 97-56790, 96-56262, and 96-56558. Appellees' answering brief is due 21 days after the opening brief is filed. Appellant's optional reply brief is due within 14 days of service of the answering brief.

/s/ Peter L. Shaw
General Order 6.3(e)

Supreme Court, U.S.
FILED
FEB 12 1999
CLERK

No. 98-1074

IN THE

Supreme Court of the United States

OCTOBER TERM 1998

CITY OF SANTA BARBARA,

Petitioner,

v.

VICKIE L. EDWARDS, KATHLEEN ROSE MCCULLEY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

The City has petitioned from a final order: *Edwards v. City of Santa Barbara*, 150 F.3d 1213 (9th Cir. 1998). In this final decision the Ninth Circuit categorically rejected an ordinance's eight-foot step back provision under any circumstances for any facilities based on an erroneous interpretation of *Schenck* and equation of the "burden no more speech than necessary" test of an injunction for the "narrow tailoring" test of an ordinance.

The Petition suffers no jurisdictional defect. *Edwards* raises the Question Presented. The Ninth Circuit's rationale is not limited to the ordinance's eight-foot step back provision in the access area of a place of worship.

> With respect to the floating buffer zone, our decision in *Sabelko*, invalidating an eight-foot buffer zone on the grounds that it is not narrowly tailored, is dispositive. Like the provision challenged here, the invalidated buffer zone could be invoked within one hundred feet of a clinic. Unlike the ordinance challenged in *Sabelko*, Santa Barbara's ordinance has a severability clause. We, therefore, need not invalidate the entire ordinance. *See Sabelko*, 120 F.3d at 165.

Edwards, 150 F.3d at 1217 (emphasis added).[1]

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[1]The Ninth Circuit seemingly knew that technically it was not reviewing the injunction against the step back provision at clinics, which was entered after it decided *Sabelko v. City of Phoenix*, 120 F.3d 161 (9th Cir. 1997)("*Sabelko II*"). *Edwards*, 150 F.3d at 1215-16 & n.5.

The Opposition criticizes the Petition's imprecision in framing the Question Presented. A pending later-filed City appeal challenges the subsequent injunction against the ordinance's identical provision for clinics. The Petition identified this appeal. Petition, p.7: 1-4. However, this Petition seeks review of the Ninth Circuit's categorical rejection of such regulations even though it recognized that the Court has found sufficient the three City interests served by these regulations at clinics and places of worship: (1) protecting persons seeking medical services or engaging in worship from harassment and intimidation; (2) ensuring access to medical facilities and places of worship; and (3) ensuring traffic safety. *Id.* at 1216.

The Ninth Circuit's categorical rejection is raised in *Edwards* and the Court may and should grant review. The Ninth Circuit affirmed the injunction against the City's step back provision with little discussion, finding despositive its holding that a Phoenix ordinance creating a step back buffer at clinics was unconstitutional. *Id.* at 1217.

It is timely for the Court to review the Ninth Circuit's rejection of all ordinances creating step back provisions based on *Schenck*'s use of the injunction test to find unconstitutional an injunction's different and broader moving buffer.[2]

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[2] In *Sabelko II*, the Ninth Circuit relied on *Schenck*, which rejected a moving fifteen-foot unlimited access area injunction:

> Because this broad prohibition "floated", the Court determined that demonstrators would have difficulty determining how to comply with the injunction. . . . (Citation omitted) The Court concluded that this lack of certainty about how to comply with the injunction created a substantial risk that more speech would be burdened than the injunction prohibited. Because other means might exist which would protect governmental interests and provide certainty regarding compliance, the Court held that the floating buffer zones burdened more speech than was necessary. (Citation omitted) The Phoenix ordinance suffers the same defects as the injunction in *Schenck*. . . . This uncertainty concerning compliance establishes a substantial risk that more speech will be eliminated than the ordinance itself prohibits. As such, the Phoenix ordinance lacks the narrow tailoring necessary to survive our scrutiny. (N.3. Because we find that the Phoenix ordinance is not narrowly tailored, we need not decide whether it "leave[s] open ample alternative channels of communication." *Ward*, 491 U.S. at 791, 109 S.Ct. at 2753.)

Sabelko II, 120 F.3d at 165.

This Petition's requested review will inform the Ninth Circuit and other courts how to apply *Schenck* to legislation creating different, more limited regulations that serve important interests to ensure necessary access to facilities for the exercise of First Amendment rights.

In reply to Respondents' objection, however, the City hereby amends this Petition's Question Presented:

> Whether an ordinance that prohibits impeding or hampering another's access to a facility to exercise First Amendment rights by requiring a person to step back eight feet upon a specific request within a limited access area is a constitutional time, place, and manner regulation.

CONCLUSION

Granting this Petition will advise cities and courts of the constitutional limits of legislation using a narrow moving zone of separation to redress conflicts between competing and equal First Amendment rights.

Respectfully submitted,

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